

***Indonesia – Importation of Horticultural Products,  
Animals, and Animal Products  
(DS477 / DS478)***

First Written Submission of  
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**TABLE OF ACRONYMS**

<b>Acronym</b>	<b>Full Name</b>
API-P	Producer Importer Identification Number
API-U	Registered Importer Identification Number
BULOG	Indonesian Bureau of Logistics
DGLAHS	Directorate General of Livestock and Animal Health Services
DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
HS Code	Harmonized System Code
MOA	Indonesian Ministry of Agriculture
MOT	Indonesian Ministry of Trade
PI	Producer Importer
RI	Registered Importer
RIPH	Horticultural Product Import Recommendation
UPP	Trade Services Unit of the Ministry of Trade
WTO	World Trade Organization

**TABLE OF REPORTS**

<b>Short title</b>	<b>Full Citation</b>
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Argentina – Import Measures (AB)</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<i>Argentina – Import Measures (Panel)</i>	Panel Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
<i>Brazil – Retreaded Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R,
<i>Canada – Provincial Liquor Boards (EEC)</i>	GATT Panel Report, <i>Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Canadian Provincial Marketing Agencies</i> , L/6304, adopted 22 March 1988
<i>Canada – Periodicals (Panel)</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by Appellate Body Report WT/DS31/AB/R
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>Chile – Price Band System (Article 21.5 – Argentina)(AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012

<i>China – Raw Materials (Panel)</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>Dominican Republic – Import and Sale of Cigarettes (Panel)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1
<i>EC – Poultry (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998
<i>EC – Seal Products (Panel)</i>	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R / WT/DS401/R / and Add. 1, adopted 18 June 2014, as modified by Appellate Body Reports, WT/DS400/AB/R / WT/DS401/AB/R
<i>EEC – Minimum Import Prices (GATT Panel Report)</i>	GATT Panel Report, <i>EEC – Programme of Minimum Import Prices, Licenses, and Surety Deposits for Certain Processed Fruits and Vegetables</i> , BISD 25S/68, adopted 18 October 1978
<i>EEC – Oilseeds I (GATT Panel Report)</i>	GATT Panel Report, <i>European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins</i> , L/6627, adopted 25 January 1990

<i>India – Autos (Panel)</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R, and Corr.1, adopted 5 April 2002
<i>India – Quantitative Restrictions (Panel)</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R
<i>Japan - Leather II (US) (GATT Panel Report)</i>	GATT Panel Report, <i>Panel on Japanese Measures on Imports of Leather</i> , L/5623, adopted 15 May 1984, BISD 31S/94
<i>Japan – Semi-Conductors (GATT Panel Report)</i>	GATT Panel Report, <i>Japan - Trade in Semi-Conductors</i> , L/6309- 35S/116, adopted 4 May 1988
<i>Korea – Various Measures on Beef (Panel)</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R
<i>Peru – Agricultural Products (AB)</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Shrimp (Panel)</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R

**TABLE OF JOINT EXHIBITS**

<b>JE No.</b>	<b>Description</b>	<b>Short Title</b>
JE-1	Law of the Republic of Indonesia Number 13 of 2010 Concerning Horticulture	<i>Horticulture Law</i>
JE-2	Law of the Republic of Indonesia Number 18 of 2012 Concerning Food	<i>Food Law</i>
JE-3	Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers	<i>Farmers Law</i>
JE-4	Law of the Republic of Indonesia Number 18 of 2009 on Animal Husbandry and Animal Health	<i>Animal Law</i>
JE-5	Law of the Republic of Indonesia Number 41 of 2014 Concerning Amendment of Law Number 18 of 2009 Concerning Husbandry and Animal Health,	<i>Animal Law Amendment</i>
JE-6	Regulation of the Minister of Trade Number 30/M-DAG/PER/5/2012 Concerning Provisions on the Import of Horticultural Products, May 7, 2012	<i>MOT 30/2012</i>
JE-7	Regulation of the Minister of Trade Number 60/M-DAG/PER/9/2012, Concerning Second Amendment of Regulation of the Minister of Trade Number 30/M-DAG/PER/5/2012, Sept. 21, 2012	<i>MOT 60/2012</i>
JE-8	Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticultural Products, Apr. 22, 2013	<i>MOT 16/2013</i>
JE-9	Regulation of the Minister of Trade Number 47/M-DAG/PER/8/2013 Concerning Amendment of Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, Aug. 30, 2013	<i>MOT 47/2013</i>
JE-10	Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticulture Products, as amended by Regulation of the Minister of Trade Number 47/M-DAG/PER/8/2013 Concerning Amendment of Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013	<i>MOT 16/2013 as amended by MOT 47/2013</i>
JE-11	Regulation of the Minister of Trade Number 40/M-DAG/PER/6/2015 Concerning Second Amendment to Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, June 10, 2015	<i>MOT 40/2015</i>

JE-12	Regulation of the Minister of Trade 71//M-DAG/PER/9/2015 Concerning Provisions on the Import of Horticultural Products, Sept. 28, 2015	<i>MOT 71/2015</i>
JE-13	Regulation of the Minister of Agriculture Number 60/Permentan/OT.140/9/2012, Concerning Horticultural Product Import Recommendation (RIPH), Sept. 24, 2012	<i>MOA 60/2012</i>
JE-14	Regulation of the Minister of Agriculture Number 47/Permentan/OT.140/4/2013 Concerning Import Recommendation of Horticulture Products, Apr. 19, 2013	<i>MOA 47/2013</i>
JE-15	Regulation of the Minister of Agriculture Number 86/Permentan/OT.140/8/2013 Concerning Import Recommendation of Horticulture Products, Aug. 30, 2013	<i>MOA 86/2013</i>
JE-16	Regulation of the Minister of Trade Number 24/M-DAG/PER/9/2011 Concerning Provisions on the Import and Export of Animals and Animal Products, Sept. 7, 2011	<i>MOT 24/2011</i>
JE-17	Regulation of the Minister of Trade Number 22/M-DAG/PER/5/2013 Concerning Import and Export Provisions of Animals and Animal Products, May 28, 2013	<i>MOT 22/2013</i>
JE-18	Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products Aug. 30, 2013	<i>MOT 46/2013</i>
JE-19	Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2013 Concerning Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, Sept. 26, 2013	<i>MOT 57/2013</i>
JE-20	Regulation of the Minister of Trade 17/M-DAG/PER/3/2014 Concerning Second Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, Mar. 27, 2014	<i>MOT 17/2014</i>
JE-21	Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products, as amended by Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2013 Concerning Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, and Regulation of the Minister of Trade 17/M-DAG/PER/3/2014 Concerning Second Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013	<i>MOT 46/2013 as amended</i>
JE-22	Regulation of the Minister of Trade Number 41/M-DAG/PER/6/2015 Concerning Third Amendment to Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013, June 10, 2015	<i>MOT 41/2015</i>

JE-23	Regulation of the Minister of Agriculture Number 50/Permentan/OT.140/9/2011 Concerning Import Approval Recommendation of Carcasses, Meats, Offal, and/or their Processed Products into the territory of the Republic of Indonesia, Sept. 7, 2011	<i>MOA 50/2011</i>
JE-24	Regulation of the Minister of Agriculture Number 63/Permentan/OT.140/5/2013 Concerning Amendment of Regulation of the Minister of Agriculture Number 50/Permentan/OT.140/9/2011, May 28, 2013	<i>MOA 63/2013</i>
JE-25	Regulation of the Minister of Agriculture Number 84/Permentan/PD.410/8/2013 Concerning Importation of Carcass, Meat, Offal and/or their Derivatives into the Territory of the Republic of Indonesia, Aug. 30, 2013	<i>MOA 84/2013</i>
JE-26	Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia, Dec. 24, 2014	<i>MOA 139/2014</i>
JE-27	Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015 Concerning Amendment to Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014, Jan. 22, 2015	<i>MOA 2/2015</i>
JE-28	Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or their Processed Products into the Territory of the Republic of Indonesia, as amended by Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015 Concerning Amendment to Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014	<i>MOA 139/2014 as amended</i>

TABLE OF U.S. EXHIBITS

Exh. No.	Description
US-1	Request for Consultations by the United States, WT/DS478/1, circulated May 15, 2014
US-2	Request for Consultations by the United States, WT/DS455/1, circulated Jan. 14, 2013
US-3	Request for the Establishment of a Panel by the United States, WT/DS455/7, circulated Mar. 15, 2013
US-4	Request for Consultations by the United States, WT/DS465/1, circulated Sept. 9, 2013
US-5	Request for Establishment of a Panel by the United States, WT/DS478/9, circulated Mar. 24, 2015
US-6	Request for Establishment of a Panel by New Zealand, WT/DS477/9, circulated Mar. 24, 2015
US-7	Anggi M. Lubis, “Failure of Self-Sufficiency Program in Sight,” <i>Jakarta Post</i> , July 23, 2013
US-8	Michael Taylor, “Indonesia’s Self-Sufficiency Push Will Drive up Beef Prices – Industry,” <i>Reuters</i> , March 4, 2014
US-9	Jack Di Nunzio, Future Directions International, <i>Hungry Neighbors? Indonesia’s Food Strategy and Water Security Future</i> , Nov. 17, 2013
US-10	Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” <a href="http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat">http://www.kemenperin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat</a>
US-11	“Meat Imports Tightened,” <i>AgroFarm</i> , Mar. 12, 2012, <a href="http://www.agrofarm.co.id/m/pertanian/189/impor-daging-diperketat/#.Vh1eo_IVhBf">http://www.agrofarm.co.id/m/pertanian/189/impor-daging-diperketat/#.Vh1eo_IVhBf</a>
US-12	Reni Kustiari, Indonesian Center for Agriculture Socioeconomic and Policy Studies, Ministry of Agriculture, “Horticultural Import Policy in Indonesia,” Food & Fertilizer Technology Center (FFTC) Agricultural Policy Platform Paper, Jan. 22, 2014, <a href="http://ap.ffc.agnet.org/files/ap_policy/188/188_1.pdf">http://ap.ffc.agnet.org/files/ap_policy/188/188_1.pdf</a>
US-13	“Chief Economic Minister Defends Ban on Horticultural Imports,” <i>Antaranews</i> , Feb. 7, 2013, <a href="http://www.antaranews.com/en/news/87288/chief-economic-minister-defends-ban-on-horticultural-imports">http://www.antaranews.com/en/news/87288/chief-economic-minister-defends-ban-on-horticultural-imports</a>

US-14	Waris Gusmiati, “Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulated,” <i>Berita 2 Bahasa</i> , Mar. 2, 2013, <a href="http://berita2bahasa.com/berita/08/10410203-mentan-quot-impor-hortikultura-tidak-dilarang-tapi-diatur-quot">http://berita2bahasa.com/berita/08/10410203-mentan-quot-impor-hortikultura-tidak-dilarang-tapi-diatur-quot</a>
US-15	“Minister of Agriculture: Food Import Dependence Threatens State Sovereignty,” <i>Kompas</i> , Apr. 27, 2015, <a href="http://foodstationjakarta.com/eng/index.php/en/news/international/98-minister-of-agriculture-food-import-dependence-threatens-state-sovereignty">http://foodstationjakarta.com/eng/index.php/en/news/international/98-minister-of-agriculture-food-import-dependence-threatens-state-sovereignty</a>
US-16	Global Business Guide Indonesia, <i>Business Updates: Import Licenses in Indonesia</i> , June 11, 2014, <a href="http://www.gbgingonesia.com/en/main/business_updates/2014/upd_import_licences_in_indonesia.php">http://www.gbgingonesia.com/en/main/business_updates/2014/upd_import_licences_in_indonesia.php</a>
US-17	Dan Wheat, “Apple Industry Still Faces Export Issues,” <i>Capital Press</i> , Sept. 9, 2013, <a href="http://www.capitalpress.com/content/djw-appleschina-072313">http://www.capitalpress.com/content/djw-appleschina-072313</a>
US-18	Request for Consultations by New Zealand, WT/DS466/1, circulated Sept. 9, 2013
US-19	Ministry of Trade, Import Approval for Horticultural Products, June 30, 2014
US-20	Shay Wester et al., US-ASEAN Business Council, “Customs Update: Debate over Port Delays in Indonesia,” June 25, 2015, <a href="https://www.usasean.org/article/2015/06/25/customs-update-debate-over-port-delays-indonesia">https://www.usasean.org/article/2015/06/25/customs-update-debate-over-port-delays-indonesia</a>
US-21	Letter from Christian Schlect, President of the Northwest Horticultural Council (NHC) Enclosing Statements from NHC Members, Nov. 3, 2015
US-22	“Chili, Onion Import Based on Reference Price,” <i>Tempo.Co</i> , Sept. 3, 2013, <a href="http://en.tempoco.com/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price">http://en.tempoco.com/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price</a>
US-23	Linda Yulisman, “Gov’t To Double Import of Fruit, Vegetables in H1,” <i>Jakarta Post</i> , Jan. 3, 2014, <a href="http://www.thejakartapost.com/news/2014/01/03/govt-double-import-fruit-vegetables-h1.html">http://www.thejakartapost.com/news/2014/01/03/govt-double-import-fruit-vegetables-h1.html</a>
US-24	RI Notification of Distribution Plan to Ministry of Agriculture, May 2015
US-25	Letter from Dr. Yul Sarry Bahar, Secretary to the Director General for Horticulture to the Secretary to the Director General of Processing and Marketing of Agricultural Products, May 6, 2015
US-26	John Hey, “Indonesia's citrus imports under threat,” <i>Asiafruit</i> , May 27 2015 <a href="http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat">http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat</a>

US-27	“Growers Left To Find a Market as Indonesia Turns away Citrus,” <i>NewsMail</i> , July 17, 2015, <a href="http://www.news-mail.com.au/news/citrus-result-a-mixed-bag/2708413/">http://www.news-mail.com.au/news/citrus-result-a-mixed-bag/2708413/</a>
US-28	Letter from the Exporter-Importer of Fresh Fruit and Vegetable Indonesian Association (ASEIBSSINDO), Oct. 22, 2015
US-29	Letter from Ministry of Trade, Director of Import to RIs Regarding the Audit of Storage Facility and Transportation Vehicles, Feb. 16, 2015
US-30	Ministry of Trade, Notification Regarding the Results of Audit of RI’s Storage Capacity
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US-36	Thomas Wright, U.S. Department of Agriculture Foreign Agriculture Service, <i>GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015</i> , Dec. 30, 2014
US-37	Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 9, 2014
US-38	Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 29, 2014
US-39	Indonesia, Applied MFN Tariff Schedule: Live Animals, Meat and Edible Meat Offal (2014), <i>WTO Tariff Download Facility</i> , <a href="http://tariffdata.wto.org/ReportersAndProducts.aspx">http://tariffdata.wto.org/ReportersAndProducts.aspx</a> (accessed Oct. 21, 2015)
US-40	Thom Wright, U.S. Department of Agriculture Foreign Agricultural Service, <i>GAIN Report ID1527: Beef and Horticultural Import License Update</i> , July 27, 2015

US-41	Letter from the Directorate General to GM PT Multirasa Nasantara in Jakarta in Response to an Application on the Importation of Frozen Beef-Short Place, Feb. 4, 2015
US-42	Query: Importation of Bovine Livers, Frozen, from 2011-2015, Monthly,” <i>BPS – Statistics Indonesia</i> (accessed Oct. 22, 2015)
US-43	Ministry of Trade, Import Approval for Beef, Sept. 25, 2014
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US-54	Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/14, June 26, 2013
US-55	Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/19, Feb. 4, 2014

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## I. INTRODUCTION

1. The measures at issue in this dispute, regrettably, demonstrate a straightforward and pervasive failure by a Member to uphold key WTO obligations governing trade in a vast array of goods. Indonesia imposes numerous prohibitions and restrictions on imports to support its domestic producers through laws and regulations governing the importation of *horticultural products* and of *animals and animal products*, and in particular through its import licensing regimes for those products. Many of these prohibitions and restrictions are explicit in the text of Indonesia's laws and regulations establishing its import licensing regimes while others emerge from the structure of these complicated and trade-restrictive regimes. Yet imposing such prohibitions or restrictions is flatly contrary to basic WTO rules, and the trade distortions that result not only affect foreign suppliers and Indonesian importers, but raise costs and reduce choices for Indonesian consumers.

2. With respect to horticultural products, the 2010 law that establishes the framework for Indonesia's approach to importation requires the government to maintain a balance of horticultural supply and demand by "controlling import and export" of horticultural products and, specifically, by "giv[ing] priority to the selling of local horticultural products."<sup>1</sup> The import licensing regime established pursuant to this law implements this guidance by imposing strict limits on when and at what level horticultural products can be imported. Among other restrictions, this import licensing regime:

- *Prevents* imports for two to three months out of every year by imposing strict application windows and limited validity periods for import permits;
- Requires importers to apply well in advance for permits that specify exactly what products can be imported and *prohibits* importation of all other products once an import period begins;
- *Limits or prohibits* imports of particular products when they might compete with local harvests;
- *Restricts* the uses for which horticultural products can be imported; and
- *Bans* the importation of certain products when their market price falls below a certain government-determined level.

This cannot be reconciled with Indonesia's WTO obligations. Each of these prohibitions and restrictions, as well as Indonesia's import licensing regime for horticultural products taken as a whole, is inconsistent with key WTO obligations set out in Article XI:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and with Article 4.2 of the *Agreement on Agriculture*.

3. Similarly, Indonesia's 2009 law establishing the framework for Indonesia's regulation of imports of animals and animal products requires that any importation of such products can be

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<sup>1</sup> Law of the Republic of Indonesia Number 13 of Year 2010 Concerning Horticulture ("Horticulture Law"), articles 90, 92(1) (JE-1). In addition to the U.S. exhibits labeled "Exh. US-X" and the joint exhibits labeled "JE-X", the United States also incorporates by reference each of the exhibits submitted by New Zealand and labeled "Exhibit NZL-X".

done only “if local production . . . is not sufficient to fulfill [Indonesian] consumption needs.”<sup>2</sup> And the import licensing regime implementing this instruction restricts imports in numerous ways, including by imposing restrictions similar to those imposed on horticultural products listed above, *as well as*:

- *Banning* outright imports of all animal products not included in Indonesia’s positive list of permitted imports;
- *Restricting* importation by requiring beef importers to first purchase a certain amount of domestic meat from local slaughterhouses before imports can be made; and
- *Prohibiting* the importation of *all* beef products if the price of certain cuts falls below a government-determined level.

Once again, each of these prohibitions and restrictions, as well as Indonesia’s import licensing regime for animals and animal products taken as a whole, is inconsistent with key WTO obligations set out in Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.

4. Not only are Indonesia’s import licensing regimes for horticultural products and for animals and animal products, as well as their constituent prohibitions and restrictions, WTO-inconsistent,<sup>3</sup> but additionally, through related laws, Indonesia *prohibits* the importation of all horticultural products and all animals and animal products when domestic production of such products is deemed by the government sufficient to satisfy domestic demand. Put differently, Indonesia only permits imports if domestic supply is deemed *insufficient*. This restriction is also facially inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

5. The current dispute is not the first complaint brought by the United States or New Zealand (the “co-complainants”) against Indonesia’s trade-restrictive import licensing regimes for horticultural products and for animals and animal products. In fact, the United States has requested consultations with Indonesia regarding these regimes three times over the past two years. Yet as the United States has sought to move these disputes forward, Indonesia, again and again, has made changes to its import licensing regimes. These changes were not directed at resolving the WTO-inconsistencies at issue in these disputes; rather, they maintained – and in some cases worsened – the restrictions in Indonesia’s import licensing regimes.

6. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) does not reward a strategy of continually amending or replacing legal instruments and does not insulate Indonesia’s regimes and requirements from review. Rather, the Panel’s terms

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<sup>2</sup> Law of the Republic of Indonesia No. 18/2009 on Animal Husbandry and Animal Health (“Animal Law”), article 36(4) (JE-4).

<sup>3</sup> Additionally, while findings on these claims would be appropriate, and sufficient to resolve the dispute, to the extent that the Panel were to consider that Indonesia’s import licensing regimes are within the scope of the *Agreement on Import Licensing Procedures* (“Import Licensing Agreement”), the procedures of these regimes would be inconsistent with Article 3.2 of that agreement.

of reference, to examine the matter referred by the DSB to the Panel when it was established,<sup>4</sup> provide the basis for the Panel to make findings and recommendations<sup>5</sup> on the measures identified by the co-complainants, such that the aim of the WTO dispute settlement system – “to secure a positive solution to a dispute” – will be achieved.<sup>6</sup> For this reason, the co-complainants are proceeding based on their panel requests in this dispute, in the knowledge that Indonesia has continued to amend its import measures, without addressing their WTO-inconsistencies, even since the co-complainants’ panel requests were filed. Indonesia may not avoid scrutiny under the DSU of its import licensing regimes and constituent prohibitions and restrictions by continually amending or replacing its regulations. The United States respectfully requests the Panel to assist the parties in securing a positive solution by concluding that Indonesia’s measures restrict imports in a manner inconsistent with its WTO obligations

7. In this submission, the United States describes Indonesia’s import licensing regimes for horticultural products and for animals and animal products, and the prohibitions and restrictions they impose, and shows how they are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. We proceed as follows:

- Section II sets out the procedural background of the dispute.
- Section III explains the factual background of the dispute, describing the restrictions and prohibitions imposed by Indonesia’s import licensing regimes for horticultural products (in Section III.A) and for animals and animal products (in Section III.B), as well as related restrictions on importation imposed by Indonesia’s laws governing the agricultural sector generally.
- Section IV.A explains the relevant legal standards.
- Sections IV.B and IV.C explain how the restrictions and prohibitions described in Sections III.A, as well as Indonesia’s import licensing regime for horticultural products as a whole, is inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.
- Sections IV.D and IV.E make the same showings with respect to the restrictions and prohibitions described in Section III.B, as well as Indonesia’s import licensing regime for animals and animal products as a whole.
- Section IV.F explains how Indonesia’s laws conditioning importation on the insufficiency of domestic production are inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.

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<sup>4</sup> DSU Article 7.1; *see infra* n.12.

<sup>5</sup> DSU Article 11 (“[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . .”); DSU Article 19.1 (“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”) (footnotes omitted).

<sup>6</sup> *See Chile – Price Band System (AB)*, paras. 140-142; *Colombia – Ports of Entry*, para. 7.246.

- Finally, should the Panel analyze certain aspects of Indonesia’s import licensing measures under the Import Licensing Agreement, Section IV.G explains how these aspects are inconsistent with Article 3.2 of that Agreement.

## II. PROCEDURAL BACKGROUND

8. On May 8, 2014, the United States requested consultations with Indonesia pursuant to Articles 1 and 4 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (“DSU”), Article XXII of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), Article 19 of the *Agreement on Agriculture*, Article 6 of the *Agreement on Import Licensing Procedures* (“Import Licensing Agreement”), and Articles 7 and 8 of the *Agreement on Preshipment Inspection*.<sup>7</sup> Pursuant to this request, the United States, together with New Zealand, held consultations with Indonesia in Jakarta, Indonesia on June 19, 2014. The parties failed to reach a mutually satisfactory resolution to this dispute.

9. On March 18, 2015, the United States requested, pursuant to Article 6 of the DSU, the establishment of a panel.<sup>8</sup> The DSB considered this request at its meetings of April 22, 2015, and May 20, 2015, and established a single Panel on May 20 to consider this dispute, together with the dispute initiated by New Zealand.<sup>9</sup>

## III. FACTUAL BACKGROUND

10. In recent years, Indonesia has aggressively pursued what it describes as a policy of “self-sufficiency” with respect to food.<sup>10</sup> The stated goal of this policy is to increase reliance on

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<sup>7</sup> Request for Consultations by the United States, WT/DS478/1, circulated May 15, 2014 (Exh. US-1).

This was the third request for consultations submitted by the United States regarding Indonesia’s import licensing regimes for horticultural products and animals and animal products. The United States first requested consultations on January 10, 2013. *See* Request for Consultations by the United States, WT/DS455/1, circulated Jan. 14, 2013 (Exh. US-2). Consultations were held on January 24 but failed to resolve the dispute, and the United States requested the establishment of a panel on March 14, 2013. *See* Request for the Establishment of a Panel by the United States, WT/DS455/7, circulated Mar. 15, 2013 (Exh. US-3). A panel was established but shortly thereafter Indonesia altered its import measures, changing certain requirements and adding additional restrictions. On August 30, 2013, the United States requested consultations a second time on the revised import measures, this time with New Zealand. *See* Request for Consultations by the United States, WT/DS465/1, circulated Sept. 9, 2013 (Exh. US-4). Again, the United States consulted with Indonesia, and again, Indonesia subsequently revised its measures, this time primarily adding new restrictions to the regimes. As a result of this second substantive revision, the United States, along with New Zealand, filed its third consultations request, which is the basis for the current dispute.

<sup>8</sup> Request for Establishment of a Panel by the United States, WT/DS478/9, circulated March 24, 2015 (Exh. US-5).

<sup>9</sup> *See* Request for Establishment of a Panel by New Zealand, WT/DS477/9, circulated March 24, 2015 (Exh. US-6).

<sup>10</sup> *See* Anggi M. Lubis, “Failure of Self-Sufficiency Program in Sight,” *Jakarta Post*, July 23, 2013 (Exh. US-7); Michael Taylor, “Indonesia’s Self-Sufficiency Push Will Drive up Beef Prices – Industry,” *Reuters*, March 4, 2014 (Exh. US-8); Jack Di Nunzio, Future Directions International, *Hungry Neighbors? Indonesia’s Food Strategy and Water Security Future*, at 5, Nov. 17, 2013 (Exh. US-9).

domestic producers by “gradually reduc[ing]” and ultimately halting altogether imports of agricultural products.<sup>11</sup> To further this goal, Indonesia has deliberately and systematically restricted imports of agricultural products in order to support and protect domestic producers. Indonesia has done so by imposing regimes of complicated, burdensome, and non-market-oriented import licensing requirements on horticultural products and on animals and animal products. Through these import licensing regimes, Indonesia has imposed numerous substantive prohibitions and restrictions on the importation of the covered products, including the prohibitions and restrictions that are at issue in this dispute.

11. This section provides a detailed description of Indonesia’s import licensing regimes for horticultural products and for animals and animal products and of the restrictions and prohibitions that Indonesia imposes through these regimes. Part A addresses the import licensing regime for horticultural products, and Part B addresses the regime for animals and animal products. Each part begins by setting out the overarching laws and policies that the import licensing regime at issue was established to implement and then describes two earlier iterations of the import licensing regime to provide background and context to inform the Panel’s understanding of the purpose and functioning of the current regimes. The current regimes, as reflected in the instruments set out in Annexes I and II of the U.S. panel request and which are the subject of this dispute, are set out in Subpart 3 to Parts A and B.<sup>12</sup>

#### **A. Indonesia’s Laws and Regulations Governing the Importation of Horticultural Products**

12. Indonesia’s trade policies protect domestic producers by banning or restricting the importation of horticultural products. The horticultural farming sector in Indonesia is dominated

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<sup>11</sup> See Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” <http://www.kemenerin.go.id/artikel/1872/Mentan:-Impor-Daging-Akan-Diperketat> (Exh. US-10) (stating that the government had set a target of self-sufficiency by 2014 and that, until that time, imports would gradually be reduced and import restrictions would be tightened in order to protect the Indonesian livestock industry); “Meat Imports Tightened,” *AgroFarm*, Mar. 12, 2012, [http://www.agrofarm.co.id/m/pertanian/189/impor-daging-diperketat/#.Vh1eo\\_lVhBf](http://www.agrofarm.co.id/m/pertanian/189/impor-daging-diperketat/#.Vh1eo_lVhBf) (Exh. US-11) (describing Agriculture Minister Suswono’s statement that Indonesia would ensure that, for 2012, imports of beef and cattle did not exceed 20% of domestic demand in order to lessen dependence on livestock and meat imports).

<sup>12</sup> The panel’s terms of reference are to examine those measures set out in the U.S. panel request that were in existence at the time of the establishment of the panel. See DSU, Articles 7.1, 6.2; *EC – Chicken Cuts (AB)*, para. 156; *China – Raw Materials (AB)*, paras. 251-255; *US – Animals SPS*, paras. 7.118, 7.447. Indonesia had promulgated other legal instruments related to the import licensing regimes for horticultural products and animals and animal products since the establishment of the panel, including Regulation of the Minister of Trade Number 40/M-DAG/PER/6/2015 Regarding Second Amendment to Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, June 10, 2015 (“MOT 40/2015”) (JE-11); Regulation of the Minister of Trade 71/M-DAG/PER/9/2015 Concerning Provisions on the Import of Horticultural Products, Sept. 28, 2015 (“MOT 71/2014”) (JE-12), and Regulation of the Minister of Trade Number 41/M-DAG/PER/6/2015 Concerning Third Amendment to Regulation of the Minister of Trade Number 46, June 10, 2015 (“MOT 41/2015”) (JE-22). The United States refers to these legal instruments, as appropriate, as additional relevant post-panel establishment evidence in support of its claims that Indonesia’s import licensing regimes breach Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. See *EC – Selected Customs Matters (AB)*, paras. 188 and 189; *EC – Selected Customs Matters (Panel)*, para. 7.37.

by small farmers, and the Indonesian government’s policy is to shield these farmers from having to compete with imported products.<sup>13</sup>

13. In 2010, Indonesia passed Law 13/2010 Concerning Horticulture (“Horticulture Law”), which established the statutory framework for Indonesia’s policy to protect domestic producers from competition from imported products. The Horticulture Law states that one of the law’s policy objectives is to “provide protection for national horticultural farmers, business players, and consumers.”<sup>14</sup> With respect to permitting the importation of horticultural products, the law directs the government to observe: (1) the availability of domestic horticultural products, and (2) the setting of targets for production and consumption of horticultural products.<sup>15</sup> The Horticulture Law also requires the Indonesian government, along with “business participants,” to maintain the balance of horticultural supply and demand by “controlling import and export” of horticultural products.<sup>16</sup> Under the law, organizers of horticultural product markets must “give priority to the selling of local horticultural products.”<sup>17</sup>

14. Indonesia reinforces this policy through Law 18/2012 Concerning Food (“Food Law”). “Food,” as defined by the law, is “everything originating from biological sources of agriculture... whether processed or not, which is designated to be eaten or drunk for human consumption.”<sup>18</sup> All of the horticultural products to which the import licensing regime applies fall under this definition. The Food Law stipulates that the “import of food can only be done if the domestic Food Production is insufficient and/or cannot be produced domestically.”<sup>19</sup>

15. In addition, Indonesian Law 19/2013 Concerning the Protection and Empowerment of Farmers (“Farmers’ Law”) further restricts importation of agricultural commodities, including horticultural products. The Farmers’ Law stipulates: “Every person *is prohibited from importing Agricultural Commodities* when the availability of domestic Agricultural Commodities is

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<sup>13</sup> See Reni Kustiari, Indonesian Center for Agriculture Socioeconomic and Policy Studies, Ministry of Agriculture, “Horticultural Import Policy in Indonesia,” Food & Fertilizer Technology Center (FFTC) Agricultural Policy Platform Paper, Jan. 22, 2014, [http://ap.ffc.agnet.org/files/ap\\_policy/188/188\\_1.pdf](http://ap.ffc.agnet.org/files/ap_policy/188/188_1.pdf) (Exh. US-12).

<sup>14</sup> Law of the Republic of Indonesia Number 13 of Year 2010 Concerning Horticulture (“Horticulture Law”), article 3 (JE-1).

<sup>15</sup> Horticulture Law, articles 88(1)(a) and (1)(b) (JE-1).

<sup>16</sup> Horticulture Law, article 90 (JE-1).

<sup>17</sup> Horticulture Law, article 92(1) (JE-1).

<sup>18</sup> Law of the Republic of Indonesia Number 18 of 2012 Concerning Food (“Food Law”), article 1(1) (JE-2).

<sup>19</sup> Food Law, article 36(1) (JE-2). For “Basic Food,” defined as the “main daily food,” importation can only be done “if the domestic Food Production and the National Food Reserve [is] insufficient.” See *id.* article 36(3) (JE-2).

sufficient.”<sup>20</sup> It also imposes criminal penalties, including up to two years imprisonment, for importing agricultural commodities when the domestic supply is sufficient.<sup>21</sup>

16. Indonesian officials have consistently affirmed the policy of protecting domestic producers and achieving self-sufficiency in food production.

- The Coordinating Minister for Economic Affairs, Hatta Rajasa, defended an import ban on certain horticultural products in 2013 by explaining that the ban was designed to protect local producers.<sup>22</sup> He also asserted that Indonesia did not need to import the horticultural products because, during the harvest season, domestic supply is sufficient to satisfy demand.<sup>23</sup>
- The Minister of Agriculture, Ir. H. Suswono, further explained that, to protect domestic farmers from competition, the importation of horticultural products should be banned during the harvest seasons of those same products in Indonesia.<sup>24</sup> “[T]he principle of import,” said Suswono, “[is] only to fill the need that is not available in the country.”<sup>25</sup>
- The current Minister of Agriculture, Amran Sulaiman, also has made statements affirming Indonesia’s policy to restrict food imports.<sup>26</sup>

17. Indonesia implements the protectionist policies set forth in the above laws primarily through import licensing regulations promulgated by the Ministries of Trade and Agriculture. The Horticulture Law requires the Minister of Agriculture to issue “recommendations” to the Minister of Trade, and on that basis the Minister of Trade issues “permits” for imports.<sup>27</sup> As analysts of the Indonesian market have explained, Indonesia’s import licensing process “can be

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<sup>20</sup> Law of the Republic of Indonesia Number 19 of 2013 Concerning Protection and Empowerment of Farmers (“Farmers Law”), article 30 (emphasis added) (JE-3).

<sup>21</sup> Farmers Law, article 101 (JE-3).

<sup>22</sup> “Chief Economic Minister Defends Ban on Horticultural Import,” *Antaranews*, Feb. 7, 2013, <http://www.antaranews.com/en/news/87288/chief-economic-minister-defends-ban-on-horticultural-imports> (Exh. US-13).

<sup>23</sup> See “Chief Economic Minister Defends Ban on Horticultural Imports,” *Antaranews* (Exh. US-13).

<sup>24</sup> Waris Gusmiati, “Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulated,” *Berita 2 Bahasa*, Mar. 2, 2013, <http://berita2bahasa.com/berita/08/10410203-mentan-quot-impor-hortikultura-tidak-dilarang-tapi-diatur-quot> (Exh. US-14).

<sup>25</sup> Gusmiati, “Ministry of Agriculture: Horticulture Imports Not Prohibited But Regulated,” *Berita 2 Bahasa* (Exh. US-14).

<sup>26</sup> “Minister of Agriculture: Food Import Dependence Threatens State Sovereignty,” *Kompas*, Apr. 27, 2015, <http://foodstationjakarta.com/eng/index.php/en/news/international/98-minister-of-agriculture-food-import-dependence-threatens-state-sovereignty> (Exh. US-15).

<sup>27</sup> Horticulture Law, article 88(2) (JE-1); see also *id.* article 1, para. 31 (JE-1).

best thought of as a built in mechanism for the government to exercise control over import quantities by imposing a number of requirements for approval.”<sup>28</sup>

18. Generally, to import horticultural products for human consumption, Indonesia requires importers to obtain a special designation from the Ministry of Trade as a Registered Importer of Horticultural Products (“RI”), an Import Recommendation for Horticultural Products (*Rekomendasi Impor Produk Hortikultura* or “RIPH”) from the Ministry of Agriculture, and an Import Approval (*Surat Persetujuan Impor* or “SPI”) from the Ministry of Trade. Indonesia maintains a similar process for importers of horticultural products used as raw materials in the production process: importers must receive designation as a Producer Importer of Horticultural Products (“PI”) from the Ministry of Trade and an RIPH from the Ministry of Agriculture.

19. To receive the relevant designations and recommendations, importers must comply with a complex array of requirements set out in regulations administered by the Ministry of Trade and Ministry of Agriculture. As the United States has described above, since the filing of the first U.S. request for consultations, these regulations have undergone multiple rounds of amendments. For the Panel’s background, and to provide further context for understanding the current import licensing regime, we will first describe the previous two iterations of the import licensing regime for horticultural products before going on to describe the current regime at issue in this dispute.

### 1. The Original Import Licensing Regulations

20. As described above, the Horticulture Law establishes the basic structure of Indonesia’s import licensing regime for horticultural products.<sup>29</sup> It stipulates that further provisions for the operation of the import licensing system be established by ministerial regulations issued within twenty-four months of the enactment of Law 13/2010.<sup>30</sup>

21. In accordance with the Horticulture Law, on May 7, 2012, the Ministry of Trade (“MOT”) promulgated *Regulation of the Minister of Trade Number 30 Concerning Provisions on the Import of Horticultural Products* (“MOT 30/2012”)<sup>31</sup>, later amended by *Regulation of the Minister of Trade Number 60* (“MOT 60/2012”).<sup>32</sup> On September 24, 2012, the Ministry of Agriculture (“MOA”) promulgated *Regulation of the Minister of Agriculture Number 60*

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<sup>28</sup> Global Business Guide Indonesia, *Business Updates: Import Licenses in Indonesia*, June 11, 2014, [http://www.gbgingonesia.com/en/main/business\\_updates/2014/upd\\_import\\_licences\\_in\\_indonesia.php](http://www.gbgingonesia.com/en/main/business_updates/2014/upd_import_licences_in_indonesia.php) (emphasis added) (Exh. US-16).

<sup>29</sup> The Horticulture Law defines “horticulture” as “anything relating to fruits, vegetables, vegetable medicine material, and floriculture, including fungus, lichen, and vegetable water plants, herbal medicine ingredients, and/or aesthetic ingredients” and “horticultural products” as “all products derived from fresh or processed horticultural plants,” see Horticulture Law, articles 1(1) and 1(4) (JE-1). All implementing regulations have incorporated these definitions.

<sup>30</sup> Horticulture Law, article 88(5), 132 (JE-1).

<sup>31</sup> Regulation of the Minister of Trade No. 30/M-DAG/PER/5/2012 Concerning Provisions on the Import of Horticultural Products, May 7, 2012 (“MOT 30/2012”) (JE-6).

<sup>32</sup> Regulation of the Minister of Trade No. 60/M-DAG/PER/9/2012 regarding the Second Amendment of Regulation of the Minister of Trade Number 30/M-DAG/PER/5/2012, Sept. 21, 2012 (“MOT 60/2012”) (JE-7).

*Concerning Recommendation on the Importation for Horticultural Products* (“MOA 60/2012”).<sup>33</sup> Together, these regulations established the original import licensing regime for the importation of fifty-seven covered horticultural products.<sup>34</sup>

22. Under MOT 30/2012, an annual “national import allocation” for the covered horticultural products was determined each year in a ministerial level “Coordination Meeting” and by considering the needs of domestic production and consumption.<sup>35</sup> The “import allocation” for each importer was determined at a sub-ministerial level “Coordination Meeting” with “due observance of [the] national import allocation.”<sup>36</sup> The process of determining the “import allocations” for each importer involved three steps, as well as numerous preconditions.

23. First, under MOT 30/2012, an importer had to apply to receive a designation either as an RI or as a PI from the Ministry of Trade.<sup>37</sup> After a field inspection by an assessment team to verify the documents submitted in the application, including evidence of the importer’s “experience” as a horticultural products distributor for at least one year and of sales collaboration contracts with at least three other distributors, the Ministry of Trade could issue the designation.<sup>38</sup> An importer designated as an RI could not import products to sell directly to retailers or consumers; sales were required to be made to distributors only.<sup>39</sup> Similar import restrictions applied to an importer designated as a PI; it could import products for its own industrial production process, but not for trade or transfer to others.<sup>40</sup>

24. Second, prior to importing horticultural products into Indonesia, an importer had to obtain an RIPH from the Ministry of Agriculture.<sup>41</sup> Before issuing the RIPH certificate, MOA 60/2012 required the Ministry of Agriculture to consider the domestic production and availability of similar products, domestic consumption of the products, the domestic harvest period of the products, and the potential of the imported products to distort the market.<sup>42</sup> Once issued, the

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<sup>33</sup> Regulation of the Minister of Agriculture Regulation No. 60/Permentan/OT.140/9/2012 Concerning Recommendations for the Importation of Horticultural Products, Sept. 24, 2012 (“MOA 60/2012”) (JE-13).

<sup>34</sup> See MOT 30/2012, Appendix 1 (JE-6) (listing the horticultural products to which the import licensing requirements applied).

<sup>35</sup> MOT 30/2012, article 4(1) (JE-6).

<sup>36</sup> MOT 30/2012, article 4(2) (JE-6).

<sup>37</sup> MOT 30/2012, articles 7 and 9 (JE-6). MOT 30/2012, article 1(7) defines RIs as companies which import Horticultural Products for the purpose of business activity by trading or transferring to other parties. See MOT 30/2012, article 1(7) (JE-6). MOT 30/2012, article 1(6) defines PIs as industrial companies which use Horticultural Products as raw materials or supporting materials in the production process itself and not trading or transferring to other parties. *Id.* article 1(6) (JE-6). These categories of import companies are made mutually exclusive by the requirements of the application.

<sup>38</sup> MOT 30/2012, article 9 (JE-6).

<sup>39</sup> MOT 30/2012, article 12 (JE-6).

<sup>40</sup> MOT 30/2012, article 8 (JE-6).

<sup>41</sup> MOA 60/2012, article 5(2) (JE-13).

<sup>42</sup> MOA 60/2012, article 7 (JE-13).

RIPH specified, *inter alia*, the type, quantity, country of origin, and the port of entry of the horticultural product an importer could bring into Indonesia during the validity period determined by the Ministry of Agriculture.<sup>43</sup>

25. Third, RIs (but not PIs) had to obtain an Import Approval covering each product requested by submitting evidence of its RI designation and its RIPH to the Ministry of Trade.<sup>44</sup> MOT 30/2012 stipulated that the importation of horticultural products had to observe, *inter alia*, the availability of domestic horticultural products and the goals set for horticultural production and consumption.<sup>45</sup> Furthermore, importation could only be done if domestic horticultural supply had not fulfilled the public consumption demand.<sup>46</sup>

26. In January 2013, the United States requested consultations with Indonesia regarding these measures.<sup>47</sup> After consultations had failed to resolve the dispute and the United States had made its first request for the establishment of a panel, Indonesia issued new import licensing regulations that replaced MOT 30/2012 and MOA 47/2012 in their entirety. This second iteration of Indonesia’s import licensing regulations is described in the section that follows.

## 2. The April 2013 Import Licensing Regulations

27. In April 2013, Indonesia issued *Regulation of the Minister of Trade Number 16 Concerning Provisions on the Import of Horticultural Products* (“MOT 16/2013”),<sup>48</sup> which replaced MOT 30/2012 (as amended), and *Regulation of the Minister of Agriculture Number 47 Concerning Import Recommendation for Horticultural Products* (“MOA 47/2013”),<sup>49</sup> which replaced MOA 60/2012. The new regulations omitted some of the restrictions introduced under the 2012 measures, but maintained many others and also established certain new restrictions.

28. MOT 16/2013 continued to require importers to obtain recognition as either RIs or PIs, and retained the prohibitions on the sale of horticultural products directly to consumers or retailers.<sup>50</sup> RIs were still required to receive Import Approvals from the Ministry of Trade before

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<sup>43</sup> MOA 60/2012, Attachment I, Format 1-3 (JE-13). Article 27 also stipulated that any quantity in excess of the quantity specified in the RIPH “will be rejected.”

<sup>44</sup> MOT 30/2012, articles 10 and 11 (JE-6).

<sup>45</sup> MOT 30/2012, article 2(1) (JE-6).

<sup>46</sup> MOT 30/2012, article 2(2) (JE-6).

<sup>47</sup> Request for Consultations by the United States, WT/DS455/1, circulated Jan. 14, 2013 (Exh. US-2).

<sup>48</sup> Regulation of the Minister of Trade 16/M-DAG/PER/4/2013 Concerning Provisions on the Import of Horticultural Products, Apr. 22, 2013 (“MOT 16/2013”) (JE-8).

<sup>49</sup> Regulation of the Minister of Agriculture Regulation 47/ Permentan/OT.140/4/2013 Concerning Import Recommendation for Horticultural Products, Apr. 19, 2013 (“MOA 47/2013”) (JE-14).

<sup>50</sup> MOT 16/2013, articles 15 (RI “can only trade and/or transfer the imported Horticultural Products to the Distributor.”) and 7 (PIs are “prohibited from trading and/or transferring” imported Horticultural Products) (JE-8).

they could import the covered horticultural products<sup>51</sup>, and all importers still had to obtain an RIPH from the Ministry of Agriculture.<sup>52</sup>

29. Compared with the 2012 regulations, MOT 16/2013 and MOA 47/2013 omitted the provisions that required the Minister of Trade and the Minister of Agriculture to consider during the import licensing process: 1) the production and availability of similar products domestically; 2) domestic supply and consumption of the product; 3) the goals set for domestic production and consumption; and 4) the potential of the imported product to distort the market. The new regulations also reduced the number of horticultural products covered by its import licensing regime to fifty-seven to thirty-nine.

30. Notably, however, MOA 47/2013 introduced significant new requirements that importers had to satisfy. First, the Ministry of Agriculture required importers to obtain RIPHs twice a year, with the validity period for the first RIPH from January to June and for the second RIPH from July to December. Importers could only apply for each RIPH during a limited window of time (late December for the first RIPH and late June for the second one).<sup>53</sup>

31. As under the 2012 regulations, the RIPH specified the type, quantity, country of origin, and port of entry of the horticulture products that could be imported into Indonesia.<sup>54</sup> However, combined with the new restrictions on validity periods, the 2013 regulations had the effect of restricting the total quantity of imported horticulture products during an entire six month period to the quantity specified on the importers' RIPHs. When an importer exhausted the quantity specified under its RIPH for the first half of the year, the importer could not request another one to import any additional horticulture products. Instead, the importer had to wait until it could request and receive a new RIPH for the second half of the year.

32. Second, MOA 47/2013 restricted imports of fresh horticultural products that were harvested more than six months prior to importation.<sup>55</sup> This restriction limited the importation of certain fruits, such as apples, that are harvested once per year and kept fresh using climate control so that they can be shipped year round. According to the Washington Apple Commission, sales to Indonesia during the 2013 season were down 36 percent (from 2.1 million to 1.3 million boxes) as of September of that year<sup>56</sup> due in part to the ban on apples harvested more than six months previously. In that group's view, this restriction meant the "loss of an

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<sup>51</sup> MOT 16/2013, article 12 and Appendix (JE-8). These products include certain fresh and frozen fruits and vegetables, processed vegetables, dried fruits, jams, jellies, and fruit juices.

<sup>52</sup> MOA 47/2013, article 4 (JE-14).

<sup>53</sup> MOA 47/2013, article 11 (JE-14).

<sup>54</sup> MOA 47/2013, Appendix I (JE-14).

<sup>55</sup> MOA 47/2013, article 7(1) (JE-14).

<sup>56</sup> See Dan Wheat, "Apple Industry Still Faces Export Issues," *Capital Press*, Sept. 9, 2013, <http://www.capitalpress.com/content/djw-appleschina-072313> (Exh. US-17).

important late season market in July, August and September of prior-year Red Delicious [apples].”<sup>57</sup>

33. The United States and New Zealand requested consultations with Indonesia with respect to the above MOT and MOA regulations in August 2013.<sup>58</sup> On the same day that these requests were filed, Indonesia again issued new import licensing regulations. These new measures retained the overall structure of the import licensing regime but, again, made important changes to the requirements for importing horticultural products. This third iteration of Indonesia’s import licensing regime, which is the subject of the current dispute, is described in the section that follows.

### 3. The Current Import Licensing Regulations

34. In August 2013, Indonesia issued *Regulation of the Minister of Trade Number 47* (“MOT 47/2013”),<sup>59</sup> which amended MOT 16/2013, and *Regulation of the Minister of Agriculture Number 86 Concerning Import Recommendation for Horticultural Products* (“MOA 86/2013”),<sup>60</sup> which replaced MOA 47/2013. These regulations form the basis of the current import licensing regime that applies to the importation of horticultural products.<sup>61</sup>

35. These new regulations maintained the structure of Indonesia’s import licensing regime, as established by the older regulations. They also introduced new restrictions that further limited the importation of horticultural products into Indonesia.

36. The current import licensing regime covers thirty-nine horticultural products identified by the Ministries of Agriculture and Trade.<sup>62</sup> These products range from fresh and frozen fruits and vegetables (including apples, grapes, durians, chilies, and shallots) to processed vegetables, dried

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<sup>57</sup> See Wheat, “Apple Industry Still Faces Export Issues,” *Capital Press* (Exh. US-17).

<sup>58</sup> Request for Consultations by the United States, WT/DS465/1, circulated Sept. 9, 2013 (Exh. US-4); Request for Consultations by New Zealand, WT/DS466/1, circulated Sept. 9, 2013 (Exh. US-18).

<sup>59</sup> Regulation of the Minister of Trade 47/M-DAG/PER/8/2013 Concerning Amendment to Regulation of the Minister of Trade Number 16/M-DAG/PER/4/2013, Aug. 30, 2013 (“MOT 47/2013”) (JE-9).

<sup>60</sup> Ministry of Agriculture Regulation 86/Permentan/OT.140/8/2013 Concerning Import Recommendations for Horticultural Products (“MOA 86/2013”) (JE-15).

<sup>61</sup> Throughout this submission, we use the phrase “current regulations” or “current regime” to refer to the instruments that were cited and described in the complaining parties’ panel requests and through which the regime and requirements that are the subject of this dispute are maintained. With respect to horticultural products, these regulations are contained in Annex I of the U.S. panel request, and include MOA 86/2013 (JE-15) and MOT 16/2013, as amended by MOT 47/2013 (“MOT 16/2013, as amended by MOT 47/2013”) (JE-10). Since the panel was established, Indonesia has issued another amendment to MOT 16/2013, namely MOT 40/2015 (JE-11), and a new regulation replacing MOT 16/2013, MOT 71/2015 (JE-12). We refer to these measures separately, as relevant post-panel establishment evidence that further supports a finding of a breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture as of the establishment of the panel.

<sup>62</sup> See MOT 16/2013, as amended by MOT 47/2013, article 2 and Appendix I (JE-10). MOA 86/2013, article 7(1) and Appendix II (JE-15).

fruits, jams, jellies, and fruit juices. Importers must receive approval from the Ministries of Trade and Agriculture to import any of these horticultural products.

*a. Application Procedures*

37. Similar to the import licensing regime established under the prior regulations, importers generally must obtain three approvals from the government of Indonesia prior to importation of the regulated horticultural products: (1) designation either as a RI or PI from the Ministry of Trade; (2) an RIPH from the Ministry of Agriculture; and (3) for RIs, an Import Approval from the Ministry of Trade. Each of these application procedures is described in detail below.

38. *RI or PI Designation:* To import the horticultural products listed in MOT 16/2013, as amended by MOT 47/2013, Indonesia requires importers to obtain an RI or PI designation from the Ministry of Trade’s Coordinator and Implementer of the Trade Services Unit (“UPP Coordinator”).<sup>63</sup>

39. For designation as an RI, an importer applicant must first submit an application with copies of at least nine official documents, including proof of ownership of storage area, proof of contracts with at least three distributors, and a statement affirming that it will not sell the covered horticultural products directly to consumers or retailers.<sup>64</sup> The UPP Coordinator and an assessment team check the application for completeness and accuracy before granting the designation.<sup>65</sup> Once issued by the UPP Coordinator, the RI designation remains valid for two years.<sup>66</sup>

40. Designation as a PI follows a similar process with one notable difference: applicants must submit to the UPP Coordinator the RIPH issued by the Ministry of Agriculture.<sup>67</sup> This means

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<sup>63</sup> MOT 16/2013, as amended by MOT 47/2013, articles 2, 3, and 8. (JE-10). Like its predecessor regulations, MOA 16/2013, as amended, maintains the distinction between RI and PI: RI refers to “a company that imports Horticultural Products for the needs of business activity and trades and/or transfers these products to other parties”, *see* MOT 16/2013, as amended by MOT 47/2013, article 1(7) (JE-10); PI refers to “an industrial company that uses Horticultural Products as a raw material or a supplementary material in its production process and does not trade or transfer it to other parties,” *see id.* article 1(6)) (JE-10).

<sup>64</sup> MOT 16/2013, as amended by MOT 47/2013, article 8(1) (JE-10). The other documents importers must submit are: Trading License/Surat Izin Usaha Perdagangan (SIUP) whose scope of business includes horticulture or other similar business license published by authorized agency or technical office; Company Registration Card/Tanda Daftar Perusahaan (TDP); Tax Identification Number/Nomor Pokok Wajib Pajak (NPWP); Photocopy of General Importer Identification Number/Angka Pengenal Importir Umum (API-U); Proof of means of transport in accordance with product characteristics; and Proof of experience as a Horticultural Product distributor for 1 year.

<sup>65</sup> MOT 16/2013, as amended by MOT 47/2013, articles 8(2) and 8(4) (JE-10).

<sup>66</sup> MOT 16/2013, as amended by MOT 47/2013, articles 8(6) and 9 (JE-10).

<sup>67</sup> MOT 16/2013, as amended by MOT 47/2013, article 5(1) (JE-10). The other documents importers must submit are: Industrial Business License, or another business license for raw horticultural materials, that is issued by the agency or technical office that has authority; Certificate of Company Registration (TDP); Tax Identification Number (NPWP); Producer Importer Identification Number (API-P); Proof of control over storage facilities appropriate for the product’s characteristics; Proof of control over transportation appropriate for the product’s characteristics.

that importers applying to become a PI must obtain approval from the Ministry of Agriculture before approaching the Ministry of Trade. Instead of two years, an importer's designation as a PI remains valid only for the duration of the importer's RIPH (six months).<sup>68</sup>

41. *Import Recommendation from MOA:* Next, in addition to the RI or PI designation, MOA 86/2013 obliges importers to obtain an RIPH from the Ministry of Agriculture before they can import covered horticultural products into Indonesia. To apply for an RIPH, an importers must submit its application and the required administrative documents to the Ministry of Agriculture Director General of Processing and Marketing of Agricultural Products.<sup>69</sup> The importer must indicate on the application the type of horticultural product, the time of entry into Indonesia, the country of origin, and the port of entry.<sup>70</sup>

42. The Ministry of Agriculture issues four different forms of RIPHs: RI importing fresh horticultural products, RI importing processed horticultural products, PI importing fresh horticultural products, and PI importing processed horticultural products. The types of administrative documentation required depend on the form that the applicant applied for.

43. For an RI seeking to import fresh horticultural products, its RIPH application must be accompanied by eight administrative documents including: a statement that it will not import horticultural products harvested more than six months previously, a statement that it owns the appropriate storage and distribution facilities, a statement that it has sufficient storage capacity, and a plan on when and where it would distribute the imported products.<sup>71</sup> If the importer submits incorrect information in the application or administrative documents, the Director General can sanction the importer by not granting it RIPH for one year.<sup>72</sup>

44. *Import Approvals:* MOT 16/2013, as amended by MOT 47/2013, further requires an RI to obtain an "Import Approval" from the Ministry of Trade UPP Coordinator before it can import the covered horticultural products during the six month import period ("semester").<sup>73</sup> An RI applies for an Import Approval by submitting its application, RIPH and designation as an RI to the UPP Coordinator.<sup>74</sup> The application must include the type of imported product, the quantity requested for the six month semester, the country of origin, and the port of entry.<sup>75</sup> An Import Approval is issued at the beginning of the six month semester and is valid only during the

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<sup>68</sup> MOT 16/2013, as amended by MOT 47/2013, article 6 (JE-10).

<sup>69</sup> MOA 86/2013, article 6(1) (JE-15).

<sup>70</sup> MOA 86/2013, article 9(2) (JE-15).

<sup>71</sup> MOA 86/2013, articles 8(1) and 8(2) (JE-15). The other documents an applicant must submit are as follows: the RI designation; the API-U; farm/business area registration information or Certificate of Good Agriculture Practices (GAP); and the post-harvest storage facility/packing house registration issued by the authorized agency from the country of origin.

<sup>72</sup> MOA 86/2013, article 14 (JE-15).

<sup>73</sup> MOT 16/2013, as amended by MOT 47/2013, articles 11 and 12 (JE-10).

<sup>74</sup> MOT 16/2013, as amended by MOT 47/2013 article 13(1) (JE-10).

<sup>75</sup> Ministry of Trade, Import Approval for Horticultural Products, June 30, 2014 (Exh. US-19).

semester.<sup>76</sup> For chilies and fresh shallots for consumption, Import Approvals are valid for three months.<sup>77</sup>

*b. Application Windows and Validity Periods of Required Import Documents*

45. The combination of the limited application windows and the six month validity period of RIPHs and Import Approvals creates time periods within each six-month semester during which RIs cannot import any horticultural products into Indonesia.

46. Indonesia divides the importation periods for horticultural products into two semesters of six months. To import horticultural products during the January 1 – June 30 semester, an RI has fifteen working days in November of the previous year to obtain the RIPH from the Ministry of Agriculture and the month of December to obtain the Import Approval from the Ministry of Trade.<sup>78</sup> For the July 1 to December 31 semester, the RI must obtain the RIPH in May and the Import Approval in June. Import Approvals are then issued “at the beginning of the semester” and are valid only for that semester.<sup>79</sup> Thus, importers cannot apply in advance for Import Approvals for future semesters or apply for additional Import Approvals covering different types or quantities of products once the semester has begun.

47. Further, horticultural products imported during a validity period cannot be shipped from their country of origin until after the Import Approvals for that period are issued,<sup>80</sup> and they must arrive in Indonesia and clear customs before the end of the semester.<sup>81</sup> Indonesia will either destroy or re-export the imported horticultural products if they fail to clear customs before their Import Approvals expire.<sup>82</sup> The narrow window to apply for RIPHs and Import Approvals, and the requirement that imported horticultural products must be shipped after the Import Approvals

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<sup>76</sup> MOT 16/2013, as amended by MOT 47/2013, articles 13A and 14 (JE-10).

<sup>77</sup> MOT 16/2013, as amended by MOT 47/2013, article 14 (JE-10).

<sup>78</sup> A different schedule applies to the importation of chilies and fresh shallots for consumption.

<sup>79</sup> MOT 16/2013, as amended by MOT 47/2014, article 13A(3) (JE-10).

<sup>80</sup> Ministry of Trade, Import Approval for Horticultural Products, para 1 (Exh. US-19) (stating: “Imports of the aforementioned Horticultural Products must undergo verification or technical inquiry in the country of origin ... in a manner that is in accordance with customs procedures” and the RI “must show an original copy of this Import Approval letter for Horticultural Products to a Customs and Excise official, on site, for each importation activity, in order to complete the Import Realization Control Card (attached), which verifies the quantity and type of imported goods”).

<sup>81</sup> Ministry of Trade, Import Approval for Horticultural Products, para 7 (Exh. US-19) (stating: “This Import Approval is valid beginning July 1, 2014 (one July two thousand fourteen) until December 31, 2014 (thirty one December two thousand fourteen), as proven by the date of a customs registration notice, Manifest (BC 1.1), in accordance with valid customs provisions”).

<sup>82</sup> MOT 16/2013, as amended by MOT 47/2013, article 30(2) (JE-10) (stating: “If a fresh Horticultural Product import... is not the Horticultural Product included... in the Import Approval, it will be destroyed in accordance with regulatory legislation”). Indonesia will re-export imported processed horticultural products that are not included in the Import Approval. *See id.* article 30(3) (JE-10).

are issued and clear customs before the end of the semester, effectively preclude imports of horticultural products during the beginning and end each of semester.

48. The following example of an RI who seeks to import horticultural products from an U.S. exporter during the January to June semester illustrates the effect of the application window and validity period requirements. The RI cannot apply for an Import Approval for the semester until December and will not receive one until January. Only once the Import Approval is issued can the RI place orders and can the exporters begin the inspection and shipping process. It generally takes five to six weeks for a shipment from the United States to arrive in Indonesia. Thus, goods will not start arriving in Indonesia until the fifth or sixth week of the semester at the earliest – around mid-February. However, because goods must clear Indonesian customs before June 30, the U.S. exporter also must stop shipping about five to six weeks before the end of the semester – around mid-May. (This is assuming that there are no additional delays in transit or at the border, which are not infrequent.<sup>83</sup>) In the meantime, the exporter cannot ship any horticultural products pursuant to the next semester’s Import Approvals because they are not valid until July 1 and are not issued until the beginning of that semester.

49. As can be seen from this example, when the limited application windows and validity periods imposed by Indonesia’s regulations are applied with respect to products with typical shipping times of at least five to six weeks, the result is approximately ten to twelve weeks out of the year when the exporter cannot ship any horticultural products to Indonesia.<sup>84</sup>

*c. Requirements for the Quantity, Type, Country of Origin, and Port of Entry for Products Imported During Each Semester*

50. An importer’s RIPH and Import Approval together specify the type, quantity, country of origin, and port of entry of the imported horticultural products. Once these documents are issued for a six month semester, an importer cannot change their terms. These documents, therefore, restrict the importation of horticultural products by limiting the imports that are permitted to enter during any six-month semester to those products meeting their specified terms.<sup>85</sup>

51. As described above, the Ministry of Agriculture divides the year into two six-month semesters – January 1 to June 30 and July 1 to December 31 – and accepts applications for RIPHs for each semester only during fifteen working days in the month prior to the start of the

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<sup>83</sup> See Shay Wester et al., US-ASEAN Business Council, “Customs Update: Debate over Port Delays in Indonesia,” June 25, 2015, <https://www.usasean.org/article/2015/06/25/customs-update-debate-over-port-delays-indonesia> (Exh. US-20).

<sup>84</sup> Many members of the U.S. Northwest Horticultural Council reported that the rigidity of the time periods had indeed caused them to stop shipments to Indonesia for approximately 12 weeks out of the year. See Letter from Christian Schlect, President of the Northwest Horticultural Council (NHC) Enclosing Statements from NHC Members, Nov. 3, 2015 (“NHC Statements”) (Exh. US-21).

<sup>85</sup> Different requirements apply to the importation of chilies and fresh shallots for consumption. RIs may apply for Import Approvals for chilies and shallots at any time. See MOT 16/2013, as amended by MOT 47/2013, articles 13A (JE-10). Their importation is controlled by the “Reference Prices” system as discussed below.

period.<sup>86</sup> When applying for an RIPH, an importer applicant must indicate the type, country of origin, and the port of entry of the horticultural products it seeks to import.<sup>87</sup> The Ministry of Agriculture issues the RIPH within seven days after receiving the complete application. Once issued, the importers cannot amend the RIPH or change the specified terms within the same import period.

52. Thus, once issued, the RIPH locks in, *inter alia*, the type (name and tariff/Harmonized System number), the country of origin, and the port of entry of the horticultural products that the importer is allowed to bring in during the following six month validity period.<sup>88</sup> For RIs and PIs, this means that they are prohibited from importing products of a different type, from another country, or through a different port during the six month period than those specified in their RIPHs.

53. For an importer with an RI designation, it must also obtain an Import Approval from the Ministry of Trade after it receives its RIPH from the Ministry of Agriculture. The validity periods of the Import Approvals correspond to the six month validity periods of the RIPHs.<sup>89</sup> The Ministry of Trade issues Import Approvals only twice a year, and RIs can apply for Import Approvals only during the month prior to the start of a period, i.e. during December or June.<sup>90</sup> Once Import Approvals are issued, RIs may not amend them or apply for another Import Approval until the next application window.

54. Upon issuance, Import Approvals lock in the type (name and tariff/Harmonize System number), quantity, country of origin, and port of entry of the horticultural products allowed to be imported during the six month semester.<sup>91</sup> For example, in the Import Approval reproduced in Table 1 below, the RI has approval to import, *inter alia*, 710 tons of apples from the United States through the Port of Tanjung Perak in Surabaya during the six month semester. This means that during the semester, this Import Approval caps the quantity of U.S. apples the RI can import at 710 tons. These apples must all enter Indonesia through Tanjung Perak, Surabaya. The approved quantities of imported products are not interchangeable, meaning that the RI could not import 100 more tons of U.S. apples by, for example, importing 100 fewer tons of apples from China.

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<sup>86</sup> MOA 86/2013, article 13(2) (JE-15).

<sup>87</sup> MOA 86/2013, article 9 (JE-15).

<sup>88</sup> MOA 86/2013, article 6 and Attachment I (JE-15).

<sup>89</sup> MOT 16/2013, as amended by MOT 47/2013, article 13A (JE-10).

<sup>90</sup> MOT 16/2013, as amended by MOT 47/2013, article 13A (JE-10).

<sup>91</sup> Ministry of Trade, Import Approval for Horticultural Products, June 30, 2014 (Exh. US-19); MOT 16/2013, as amended by MOT 47/2013, article 14 (JE-10).

**Table 1. Example Import Approval for Horticultural Products**

No.	Description of Goods	Tariff/HS No.	Volume	Country of origin	Destination Port
1	Apple	0808.10.00.00	500 (five hundred) tons	China	Tanjung Perak, Surabaya
2	Mandarin Orange	0805.20.00.00	200 (two hundred) tons	China	Tanjung Perak, Surabaya
3	Carrot	0706.10.10.00	1,460 (one thousand four hundred sixty) tons	China	Tanjung Perak, Surabaya
4	Fresh Grapes	0806.10.00.00	700 (seven hundred) tons	China	Tanjung Perak, Surabaya
5	Apple	0808.10.00.00	710 (seven hundred ten) tons	United States of America	Tanjung Perak, Surabaya
6	Fresh Grapes	0806.10.00.00	440 (four hundred forty) tons	United States of America	Tanjung Perak, Surabaya
7	Longans (including those known as <i>mata kucing</i> [or, “cat’s eye”])	0810.90.10.00	1,040 (one thousand forty) tons	Thailand	Tanjung Perak, Surabaya
<b>TOTAL</b>			5,050 (five thousand fifty) tons		

55. Finally, Indonesia imposes penalties for RIs that deviate from their Import Approvals. If the imported fresh or processed horticultural products are “not in accordance with horticultural products included... [in] the Import Approval,” Indonesia will either destroy or re-export them, at the cost of the importer.<sup>92</sup> Thus, RIs are prohibited from importing products of a different type, in a greater quantity, from a different country, through a different port during the six month semester than those stipulated in their Import Approvals.

*d. The Import Realization Requirement*

56. Under the current import licensing regime, for each semester, RIs are required to import (or “realize”) at least 80 percent of the quantity specified for each type of horticultural product listed on their Import Approval.<sup>93</sup> An RI must account for the quantity of its realized imports during the semester by submitting an Import Realization Control Card every month to the Director General of Foreign Trade at the Ministry of Trade.<sup>94</sup> The Ministry of Trade sanctions RIs that fail to meet the 80 percent realization requirement or fail to file the Import Realization Control Card by suspending their RI designations.<sup>95</sup> An RI that fails to file the Import Realization Control Card three times could have its designation revoked.<sup>96</sup>

<sup>92</sup> MOT 16/2013, as amended by MOT 47/2013, article 30 (JE-10).

<sup>93</sup> MOT 16/2013, as amended by MOT 47/2013, article 14A (JE-10).

<sup>94</sup> MOT 16/2013, as amended by MOT 47/2013, article 14 and Appendix II (JE-10).

<sup>95</sup> According to a 2015 revision to MOT 16/2013, as amended by MOT 47/2013, the RI designation could be suspend for one year (two semesters). MOT 40/2015 (JE-11).

<sup>96</sup> MOT 16/2013, as amended by MOT 47/2013, article 26A. (JE-10).

57. The 80 percent import realization requirement compels RIs to lower the quantities they request in their Import Approval applications in order to avoid situations in which they either must import products at a loss to reach 80 percent or have their RI designation suspended. For example, if an Import Approval specifies 100 tons of apples, but the RI can only sell 50 tons profitably during the semester, the RI either has to import 30 tons of apples at a loss to meet the 80 percent requirement or have its designation suspended by the Ministry of Trade. Given the inherent uncertainty of consumer demand in Indonesia and supply from countries of origin, the 80 percent import realization requirement necessarily causes RIs to request smaller product quantities when they apply for Import Approvals.

58. The Ministry of Trade has repeatedly emphasized the punitive consequences of not meeting the 80 percent import realization requirement. In September 2013, Minister Wirjawan stated: “We will keep monitoring and evaluating. If importers do not fulfill their obligation, their status as registered importers will be revoked.”<sup>97</sup> In January 2014, the Director General of Foreign Trade Bachrul Chairi announced that the government had approved an increase in the import volume of 17 fruits and vegetables; but he also warned that the Ministry “will be strict with importers. They must realize at least 80 percent of their approved import volumes, otherwise we will revoke their permits.”<sup>98</sup>

59. Indeed, many U.S. apple exporters and shippers have reported that the 80 percent import realization requirement has a chilling effect on their Indonesian importers. According to these exporters and shippers, importers in Indonesia have begun requesting lower quantities on their import approval applications, and ordering less from U.S. exporters than they otherwise would have, to avoid violation of the 80 percent threshold.<sup>99</sup>

*e. Import Limitations Based on the Indonesian Harvest Periods*

60. Under MOA 86/2013, Indonesia limits the type and quantity of imported horticultural products by restricting their importation based on the domestic harvest season for those same products. Specifically, MOA 86/2013 provides that horticultural products “are imported outside of the pre-harvest, harvest, and post-harvest periods” and grants the Minister of Agriculture the authority to decree the specified time period when importation is permitted.<sup>100</sup>

61. The Ministry of Agriculture implements this limitation through the RIPH application process. As discussed above, an RI must submit a plan as to when and where it would distribute the imported products for the six month semester.<sup>101</sup> The Ministry of Agriculture checks the

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<sup>97</sup> “Chili, Onion Import Based on Reference Price,” *Tempo.Co*, Sept. 3, 2013, <http://en.tempo.co/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price> (Exh. US-22).

<sup>98</sup> Linda Yulisman, “Gov’t To Double Import of Fruit, Vegetables in H1,” *Jakarta Post*, Jan. 3, 2014, <http://www.thejakartapost.com/news/2014/01/03/govt-double-import-fruit-vegetables-h1.html> (Exh. US-23).

<sup>99</sup> NHC Statements (Exh. US-21).

<sup>100</sup> MOA 86/2013, article 5 (JE-15).

<sup>101</sup> MOA 86/2013, articles 8(1) and 8(2) (JE-15); RI Notification of Distribution Plan to Ministry of Agriculture, May 2015. (Exh. US-24).

information in the distribution plans against Indonesia's harvest seasons for the same products. It will ban or limit the importation of the horticultural products during the harvest season of those same products through the RIPH approval process.

62. In a May 6, 2015, letter to the Director General of Processing and Marketing of Agricultural Products,<sup>102</sup> the Director General of Horticulture responded to a request for the “data and information in relation to harvesting season and monthly production from July – December 2015 for several fruit and vegetable commodities.”<sup>103</sup> The Director General of Horticulture recommended imposing an import ban on horticultural products that compete with domestic products for which the local harvest period is July-December and imposing “import restrictions” on certain products for which there is no defined local harvest season and on other products for which harvest period is in the first half of the year.

63. For example, the Director General of Horticulture recommended no shallot imports because there was a surplus of supply due to “a large harvest in [Indonesia's] production centers, Central Java, East Java, South Sulawesi and West Nusa Tenggara (NTB).” He also recommended import bans during the semester on mangoes, bananas, melons, and pineapples. For other products, such as durians and oranges, the Director General of Horticulture recommended imposing import restrictions to avoid local harvest periods that covered only part of the semester.<sup>104</sup>

64. Indonesia carried out the import limitations outlined in the May 6, 2015 letter to the Director General. Reports regarding Indonesian fruit imports confirmed in late May 2015 that the Ministry of Agriculture intended to ban citrus imports (except for lemons) between July and September. According to the spokesperson for Indonesia's association of fresh fruit and vegetable importers and exporters: “What we're told is that all types of imported citrus will only be allowed to enter and apply for arrival between October and December. In other words, citrus imports will not be released for the arrival period of July to September.”<sup>105</sup> Other sources also reported that in July 2015, Indonesia banned the importation of citrus other than lemons for the July-September 2015 quarter.<sup>106</sup>

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<sup>102</sup> The Director General of Processing and Marketing of Agricultural Products issues the RIPHs on behalf of the Minister of Agriculture. See MOA 86/2013, article 6 (JE-15).

<sup>103</sup> Letter from Dr. Yul Sarry Bahar, Secretary to the Director General for Horticulture to the Secretary to the Director General of Processing and Marketing of Agricultural Products, May 6, 2015 (“May 6 Letter”) (Exh. US-25).

<sup>104</sup> May 6 Letter (Exh. US-25).

<sup>105</sup> John Hey, “Indonesia's citrus imports under threat,” *Asiafruit*, May 27 2015 <http://www.fruitnet.com/asiafruit/article/165366/indonesias-citrus-imports-under-threat> (Exh. US-26). The spokesperson believed that the Department of Agriculture suspended citrus importation to protect local Indonesia citrus producers.

<sup>106</sup> “Growers left to find a market as Indonesia turns away citrus,” *NewsMail*, July 17, 2015, <http://www.news-mail.com.au/news/citrus-result-a-mixed-bag/2708413/> (Exh. US-27).

*f. Requirement on Storage Ownership and Capacity*

65. Indonesia limits the quantity of the imported horticultural products by requiring RIs to prove that they own storage facilities with sufficient capacity to hold the quantity requested on their Import Application.

66. An importer must submit “[p]roof of ownership of storage facilities appropriate for the product’s characteristics” to the Ministry of Trade to obtain its RI designation.<sup>107</sup> The Ministry of Trade verifies the RI’s storage capacity by sending inspectors to audit its facilities.<sup>108</sup> Then, the RI must resubmit its proof of ownership and attach a statement affirming that the storage facility is of sufficient capacity to the Ministry of Agriculture to obtain the RIPHs for fresh horticultural products.<sup>109</sup>

67. When the RI applies to the Ministry of Trade for the Import Approvals, the Ministry of Trade will limit the quantity specified on the Import Approval to the total cold storage capacity of the RI’s facility at the ratio of one to one.<sup>110</sup> This means the quantity specified on the Import Approval does not account for inventory turnover, i.e. the potential for the importer to fill the same storage capacity multiple times, during the six-month semester.<sup>111</sup>

68. Indeed, MOT 40/2015, which amended MOT 16/2013 in July 2015, confirmed Indonesia’s use of storage capacity to limit the quantity specified on the Import Approval:

The issuance of Import Approval... must take into consideration of capacity and appropriateness, with regard to the characteristic of Horticultural Products, of the storage facilities and the means of transportation owned by RI – Horticultural Products.<sup>112</sup>

*g. Requirements Concerning the Uses for Which Horticultural Products May Be Imported*

69. Indonesia imposes requirements on the importation of covered horticultural products based on the products’ use, sale, and transfer.

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<sup>107</sup> MOT 16/2013, as amended by MOT 47/2013, article 8(1)(e) (JE-10).

<sup>108</sup> See Letter from the Exporter-Importer of Fresh Fruit and Vegetable Indonesian Association (ASEIBSSINDO), Oct. 22, 2015 (“ASEIBSSINDO Letter”) (Exh. US-28); see also, Letter from Ministry of Trade, Director of Import, to RIs Regarding the Audit of Storage Facility and Transportation Vehicles, Feb. 16, 2015 (Exh. US-29); Ministry of Trade, Notification Regarding the Results of Audit of RI’s Storage Capacity (Exh. US-30).

<sup>109</sup> MOA 86/2013, article 8(2). (JE-15).

<sup>110</sup> ASEIBSSINDO Letter (Exh. US-28).

<sup>111</sup> ASEIBSSINDO Letter (Exh. US-28).

<sup>112</sup> MOT 40/M-DAG/PER/6/2015, article 1 (JE-11).

70. As noted, importers must obtain designation either as an RI or PI to import horticultural products into Indonesia.<sup>113</sup> MOT 16/2013, as amended by MOT 47/2013, stipulates that an RI can only “trade and/or transfer imported Horticultural Products to a Distributor.”<sup>114</sup> An RI is “forbidden from trading and/or transferring imported Horticultural Products directly to consumers or retailers”<sup>115</sup> In fact, an importer applicant must submit a “stamped statement letter agreeing not to sell Horticultural Products directly to consumers or retailers” as a condition of being designated as an RI.<sup>116</sup>

71. The Ministry of Trade UPP Coordinator may revoke an importer’s designation as an RI if it determines that the importer has traded or transferred imported horticultural products to a party other than a distributor.<sup>117</sup> In other words, Indonesia prohibits RIs from importing horticultural products for sale directly to consumers or retailers.

72. Indonesia imposes similar import restrictions on PIs. A PI can only “import Horticultural Products as raw materials or as supplementary materials for the needs of its industrial production process.”<sup>118</sup> MOT 16/2013, as amended by MOT 47/2013, expressly prohibits them from “trading and/or transferring these Horticultural Products.”<sup>119</sup> This includes selling or transferring excess imported horticultural products not used in the production process. If a PI “is proven to have traded and/or transferred imported Horticultural Products,” the Ministry of Trade UPP Coordinator and Implementer can revoke its designation as a PI.<sup>120</sup> Thus, Indonesia prohibits PIs from importing any horticultural products for the purpose of trading or transferring them to another entity.

*h. The Reference Price Requirement for Chilies and Shallot*

73. Indonesia prohibits the importation of chilies and fresh shallots when their market prices fall below the “Reference Prices” set by the Ministry of Trade.

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<sup>113</sup> MOT 16/2013, as amended by MOT 47/2013, article 3 (JE-10).

<sup>114</sup> MOT 16/2013, as amended by MOT 47/2013, article 15a (JE-10). A “Distributor” is defined as a “nationwide trading company that acts for, and on its own behalf, whose scope of work covers buying, storing, selling, and marketing goods, especially delivering goods from importers to retailers.” *See id.* article 1(8) (JE-10).

<sup>115</sup> MOT 16/2013, as amended by MOT 47/2013, article 15b (JE-10).

<sup>116</sup> MOT 16/2013, as amended by MOT 47/2013, article 8(1)(i) (JE-10).

<sup>117</sup> MOT 16/2013, as amended by MOT 47/2013, articles 26(f) and 27 (JE-10). Once revoked, the RI must wait at least two years before it can reapply for designation. *Id.* article 27A (JE-10).

<sup>118</sup> MOT 16/2013, as amended by MOT 47/2013, article 7 (JE-10).

<sup>119</sup> MOT 16/2013, as amended by MOT 47/2013, article 7 (JE-10).

<sup>120</sup> MOT 16/2013, as amended by MOT 47/2013, articles 26(e) and 27 (JE-10). Once revoked, the PI must wait at least two years before it can reapply. *Id.* article 27A (JE-10).

74. Separate, additional rules also apply to the importation of chilies and fresh shallots because Indonesia considers them to be “strategic products,” especially during national festival seasons, and because they “usually contribute much [to] inflation.”<sup>121</sup>

75. RIs still must obtain RIPHs to import chilies and fresh shallots, but the Ministry of Agriculture will not issue them if their market prices are below the Reference Prices.<sup>122</sup> The six month validity periods of RIPHs also do not apply to these two products.<sup>123</sup> To obtain Import Approvals for chilies and fresh shallots, RIs may submit their applications at any time (in contrast to the limited application window for the importation of other horticultural products.)<sup>124</sup> The Import Approvals for chilies and fresh shallots, however are only valid for three months instead of six months from the date of issuance.<sup>125</sup>

76. Rather than imposing time limitations on importation, the Ministries of Trade and Agriculture control the importation of chilies and fresh shallots for consumption through “Reference Prices.” MOT 16/2013, as amended by MOT 47/2013, stipulates that importation of chilies and fresh shallots must “observe” the Reference Prices established by the Horticultural Product Price Monitoring Team of the Ministry of Trade.<sup>126</sup> If the market prices of chilies or fresh shallots fall below their respective Reference Prices, the regulation requires that their importation be “postponed until the market price again reaches the Reference Price.”<sup>127</sup>

77. According to Indonesia, the Reference Prices for chilies and shallots are determined primarily based on “the average national retail price for chilies and shallots, and taking into account the cost of production and distribution for domestic chili and shallots products,

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<sup>121</sup> “Replies from Indonesia to Questions from Canada, the European Union, Japan, New Zealand and the United States (G/LIC/Q/IDN/30),” G/LIC/Q/IDN/32, WTO Committee on Import Licensing, at 15, May 21, 2014 (Exh. US-31). Chilies and shallots are major parts of the Indonesia cuisine and are “big factors in Indonesia’s inflationary pressure.” Satria Sambijantoro, “Jokowi Gives Chili, Shallot Imports the Green Light,” *Jakarta Post*, June 4, 2015, <http://www.thejakartapost.com/news/2015/06/04/jokowi-gives-chili-shallot-imports-green-light.html> (Exh. US-32); “Quotas on Beef, Chili, and Shallots Scrapped as Govt Seeks to Ease Inflation,” *Jakarta Globe*, Sept. 3, 2013, <http://jakartaglobe.beritasatu.com/business/quotas-on-beef-chilli-and-shallots-scrapped-as-govt-seeks-to-ease-inflation/> (Exh. US-33).

<sup>122</sup> MOA 86/2013, article 5(4) (stating: “Issuance of a RIPH for the horticultural products of fresh chilies and shallots for consumption, is based on the establishment of a reference price from the Minister of Trade.” (JE-15).

<sup>123</sup> MOA 86/2013, article 13(4) (JE-15).

<sup>124</sup> MOT 16/2013, as amended by MOT 47/2013, article 13A (JE-10).

<sup>125</sup> MOT 16/2013, as amended by MOT 47/2013, article 14 (JE-10).

<sup>126</sup> MOT 16/2013, as amended by MOT 47/2013, article 14B (JE-10).

<sup>127</sup> MOT 16/2013, as amended by MOT 47/2013, article 14B (JE-10).

economic growth and market outlook and other variables.”<sup>128</sup> The Horticultural Product Price Monitoring team can revise the Reference Prices at any time.<sup>129</sup>

78. In September of 2013, Indonesia’s Minister of Trade Gita Wirjawan confirmed that the Reference Price requirement was meant to restrict the importation of chilies and shallots, explaining: “If the price of red onion [shallot] and chili is under the reference price, we will delay the import until the price is back to normal, and vice versa.”<sup>130</sup>

*i. Requirement that Imported Products Must be Harvested No More Than Six Months Prior to Importation*

79. Indonesia prohibits the importation of fresh horticultural products harvested more than six months previously. As noted above, to import one of the covered horticultural products, an RI must first obtain an RIPH from the Ministry of Agriculture and an Import Approval from the Ministry of Trade.<sup>131</sup>

80. To obtain the RIPH, MOA 86/2013 requires RIs to submit a statement attesting that they will not import any products that were harvested more than six months previously.<sup>132</sup> If the applying RI fails to include such statement as part of its RIPH application, the Ministry of Agriculture will declare the application incomplete and reject it.<sup>133</sup>

81. This requirement limits the importation of certain fruits and vegetables that are shipped to global markets year round because they can be kept fresh in controlled atmosphere storage after their harvest.<sup>134</sup> For fruits like apples, which are harvested mostly in October, the six month harvest requirement would effectively stop their importation into Indonesia from April to October of the next year.

**B. Indonesia’s Laws and Regulations Governing the Importation of Animals and Animal Products**

82. In 2009, Indonesia enacted Law Number 18/2009 on Animal Husbandry and Animal Health (“Animal Law”), establishing its overall approach to the regulation of animals and animal products. With respect to importation, this law provides that “[i]mport of animals or cattle and

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<sup>128</sup> “Replies from Indonesia to Questions from Canada, the European Union, Japan, New Zealand and the United States (G/LIC/Q/IDN/30),” G/LIC/Q/IDN/32, WTO Committee on Import Licensing, at 15, May 21, 2014 (Exh. US-31).

<sup>129</sup> MOT 16/2013, as amended by MOT 47/2013, article 14B(3) (JE-10).

<sup>130</sup> “Chili, Onion Import Based on Reference Price,” *Tempo.Co*, Sept. 3, 2013, <http://en.tempo.co/read/news/2013/09/04/056510223/Chili-Onion-Import-Based-on-Reference-Price> (Exh. US-22).

<sup>131</sup> MOA 86/2013, article 4 (JE-15).

<sup>132</sup> MOA 86/2013, article 8(1)(a) (JE-15).

<sup>133</sup> MOA 86/2013, article 12 (JE-15).

<sup>134</sup> Controlled Atmospheric Storage, Washington Apple Commission, [http://bestapples.com/facts/facts\\_controlled.aspx](http://bestapples.com/facts/facts_controlled.aspx) (Exh. US-34).

animal products from foreign countries shall be done if local production and supply of animals or cattle and animal products is not sufficient to fulfill consumption needs of the society.”<sup>135</sup> With the Animal Law, Indonesia established a policy of prioritizing domestic livestock and meat producers and allowing importation only if the government deems domestic production insufficient to fulfill Indonesia’s basic needs.

83. Indonesia reinforced this policy in 2012 with enactment of the Food Law, described above.<sup>136</sup> As discussed above, Article 14 of the Food Law provides that sources of the Indonesian “Food supply originate from domestic Food Production and the National Food Reserve,” and that only if these sources are not sufficient can the food needs of the Indonesian people “be fulfilled through Food Import, according to necessity.”<sup>137</sup> Further, Article 36 of the Food Law provides explicitly that importation of food is only permissible “if the domestic Food Production is insufficient and/or not produced domestically.”<sup>138</sup>

84. Indonesian officials and ministries have declared that their government’s policy is to protect domestic producers and to achieve self-sufficiency in food production, including with respect to animals and animal products. In 2010, the Ministry of Agriculture announced the policy of promoting food self-sufficiency, and, in particular, of achieving self-sufficiency in five agricultural commodities – rice, beef, soya beans, corn, and sugar – by 2014.<sup>139</sup> Numerous officials, including the current President of Indonesia, Joko Widodo, have affirmed this policy.<sup>140</sup>

85. Indonesia has pursued this goal of self-sufficiency through its regime governing the importation of animals and animal products.<sup>141</sup> In 2012, Minister of Agriculture Suswono explained that the ministry would use Indonesia’s import licensing regulations to reduce meat imports by setting a quota for the year and then issuing permits only for that amount. He said that the Ministry would decrease Indonesia’s meat imports for 2012 by ensuring that imports did not exceed 20 percent of total demand or a volume of 85,000 tons – a reduction from the 90,000

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<sup>135</sup> Law of the Republic of Indonesia No. 18/2009 on Animal Husbandry and Animal Health (“Animal Law”), article 36(4) (JE-4).

<sup>136</sup> The Food Law covers animals and animal products as well as horticultural products. *See* Food Law, article 1(1) (JE-2) (“Food is everything originating from biological sources of agriculture, plantation, forestry, fishery, husbandry, sea, and water products, whether processed or not, which is designed to be eaten and drunk for human consumption”).

<sup>137</sup> Food Law, article 14(1)-(2) (JE-2).

<sup>138</sup> Food Law, article 36(1) (JE-2).

<sup>139</sup> Lubis, “Failure of Self-Sufficiency Program in Sight,” *Jakarta Post* (Exh. US-7).

<sup>140</sup> *See, e.g.*, Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry,” *Reuters* (explaining that Joko Widodo’s administration “has set numerous food self-sustainability targets, including beef within one year”) (Exh. US-8); Maxensius Sambodo, Institute of Southeast Asian Studies, “Post-Election Indonesia: Jokowi Set to Pursue the Goal of Self-Sufficiency,” *Food Industry Asia*, posted June 11, 2014, <http://foodindustry.asia/post-election-indonesia-jokowi-set-to-pursue-the-goal-of-self-sufficiency> (Exh. US-35) (stating that, acting on his campaign promises, “Jokowi has outlined plans to push through with self-sufficiency in key commodities including rice and other crops such as shallots by 2018”).

<sup>141</sup> *See, e.g.*, Di Nunzio, *Hungry Neighbors? Indonesia’s Food Strategy and Water Security Future* (Exh. US-9).

tons allowed in the previous year.<sup>142</sup> In 2013, Minister Suswono expressed renewed commitment to self-sufficiency in beef, explaining that “imports are only for meeting domestic shortfalls” and that, leading up to the self-sufficiency deadline in 2014, “beef imports will gradually be decreased and import restrictions will be tightened.”<sup>143</sup> When President Widodo took office in October 2014, his government further restricted imports, including by dramatically reducing the volume of beef for which import permits were granted.<sup>144</sup>

86. This section sets out the import licensing regime through which Indonesia has pursued its self-sufficiency policy and the restrictions and prohibitions on imports imposed through that regime. Indonesia first established its import licensing regime through regulations issued in 2011. These regulations have been amended, repealed, and replaced several times, although their restrictive effect on imports has continued throughout. To provide background and context to support the Panel’s understanding of the current regime, this section first describes the original import licensing regime for animals and animal products, as it was established in 2011 and then describes the changes and continuities given effect by the May 2013 amendments. The section then describes the current import licensing regime, i.e., the regime that was set out in the U.S. panel request and that is the subject of this dispute, describing the regime’s procedures and the prohibitions and restrictions imposed through it.

## 1. The Original Import Licensing Regulations

87. In September of 2011, Indonesia issued two regulations governing the importation of animals and animal products. These regulations were *Regulation of the Minister of Trade Number 24 Concerning Provisions on the Import and Export of Animal and Animal Product (“MOT 24/2011”)*<sup>145</sup> and *Regulation of the Minister of Agriculture Number 50 Concerning Import Approval Recommendations for Carcasses, Meats, Edible Offals and/or Processed Products Thereof to Indonesian Territory (“MOA 50/2011”)*.<sup>146</sup> Together, these regulations established a system of interrelated requirements for the importation of animals and animal products.<sup>147</sup>

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<sup>142</sup> “Meat Imports Tightened,” *AgroFarm* (Exh. US-11); *see also* Lubis, “Failure of Self-Sufficiency Program in Sight,” *Jakarta Post* (Exh. US-7) (stating that, in 2012, the Ministry cut import permits for live cattle by 30% and for beef meat by almost 60%, although it had to import an additional 7,000 tons of beef mid-year in response to spiking food prices).

<sup>143</sup> Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” (Exh. US-10).

<sup>144</sup> Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry,” *Reuters* (Exh. US-8) (showing that permits for the importation of beef were limited to 12,000 tons in the first quarter of 2015 compared to 170,000 tons for all of 2014).

<sup>145</sup> Regulation of the Minister of Trade No. 24/M-DAG/PER/9/2011 Concerning Provisions on the Import and Export of Animals and Animal Products, Sept. 7, 2011 (“MOT 24/2011”) (JE-16).

<sup>146</sup> Regulation of the Minister of Agriculture No. 50/Permentan/OT.140/9/2011 Concerning Import Approval Recommendations for Carcasses, Meats, Edible Offals, and/or Processed Products Thereof to Indonesian Territory, Sept. 7, 2011 (“MOA 50/2011”) (JE-23).

<sup>147</sup> Under MOT 24/2011, “animal” was defined as “animals or wildlife that spend all or part of their life cycle on land, in water, and/or in air, whether domesticated or in their natural habitat.” MOT 24/2011, article 1(1)

88. Under these regulations, only the animals and animal products listed in the appendices to both regulations could be imported into Indonesia.<sup>148</sup> Unlisted animals and animal products were banned. Further – consistent with the mandate of the Animal Law, which both regulations cited as authorizing legislation<sup>149</sup> – both regulations provided that importation of the listed animals and animal products was permissible only if domestic production was “not yet sufficient” to fulfill the public’s consumption needs or, in the case of animals, for limited purposes such as research or scientific development.<sup>150</sup>

89. The regulations also established a quota system for the importation of permitted cattle and beef products, as set out in the second appendix to MOT 24/2011 and the first attachment to MOA 50/2011.<sup>151</sup> Specifically, a national allocation for the amount of these products allowed to be imported (i.e., a quota) was set each year by the Ministry of Trade, and, based on the annual quota, individual allocations for each authorized importer were set for each semester.<sup>152</sup> Importation of animals and animal products was permitted only for certain specified purposes, namely “industry, hotel, restaurant, catering, and/or other specific uses.”<sup>153</sup>

90. Within these constraints, the regulations also established a process that was necessary to be completed for importers to be permitted to import animals and animal products. Prospective importers had to obtain three documents: (1) designation as a registered importer of animals and animal products (“RI designation”) from the Ministry of Trade<sup>154</sup>; an import approval

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(JE-16). “Animal product” was defined as “all materials derived from animals, fresh and/or processed, for consumption, pharmaceuticals, farming, and/or other purposes for fulfilling the needs and benefit of humans.” *Id.*, article 1(5) (JE-16). As discussed below, the scope of the current import licensing regime remains.

<sup>148</sup> MOT 24/2011, article 2(2) (JE-16); MOA 50/2011, article 7(1) (JE-23).

<sup>149</sup> MOT 24/2011, preamble (10) (JE-16); MOA 50/2011, preamble (6) (JE-23).

<sup>150</sup> MOT 24/2011, articles 3(1)-(2) (JE-16); *see* MOA 50/2011, 4(1)-(3) (JE-23) (stating that importation of carcasses, meats, edible offals and/or processed products thereof shall be done in accordance with a “national need analysis”).

<sup>151</sup> *See* MOT 24/2011, article 3 and Attachment 2 (JE-16) (listing the animals and animal products whose import allocation is regulated and stipulated, which are live bovine animals, bovine carcasses, and meat cuts of bovine animals); *see also* MOA 50/2011, Attachment 1 (JE-23) (listing the types of carcasses and meats of large ruminants from overseas that are allowed to be imported into Indonesian territory).

<sup>152</sup> *See* MOT 24/2011, articles 3(4) (JE-16) (stating that the “national allocation” of fresh animal and animal products that can be imported, as specified in Attachment II shall be stipulated every year based on a ministerial coordination meeting and “taking into consideration production and domestic consumption needs”) and 3(5) (stating that an import allocation for the animals and animal products specified in Attachment II for each registered importer of animals and animals products shall be stipulated every semester, in light of the national allocation set under article 3(4)).

<sup>153</sup> MOA 50/2011, article, 3(3) (JE-23); MOT 24/2011, article 7 (JE-16).

<sup>154</sup> MOT 24/2011, articles 1(9), (4)(1) (JE-16).

recommendation (“Recommendation”) from the Ministry of Agriculture<sup>155</sup>; and an Import Approval from the Ministry of Trade (“Import Approval”).<sup>156</sup>

91. Recommendations and Import Approvals were valid for one six-month period and, once issued, specified the type, quantity, country of origin, and port of entry of all the products that each importer would be allowed to import during that period,<sup>157</sup> as well as the intended use of the goods to be imported.<sup>158</sup> Imported animals or animal products whose type, quantity, or country or origin was not in accordance with the importer’s import license were required to be re-exported at the importer’s expense.<sup>159</sup>

92. The United States requested consultations on the original import licensing regime, as maintained through MOT 24/2011 and MOA 50/2011, on January 10, 2013, and the DSB established a panel at the U.S. request on April 24, 2013. Before the panel was composed, however, Indonesia repealed and replaced MOT 24/2011 and significantly amended MOA 50/2011. The next section describes this second version of Indonesia’s import licensing regime.

## 2. The May 2013 Import Licensing Regulations

93. In May 2013, Indonesia issued two new regulations, *Regulation of the Minister of Trade Number 22 Concerning Provisions on the Import and Export of Animals and Animal Products* (“MOT 22/2013”), which repealed and replaced MOT 24/2011,<sup>160</sup> and *Regulation of the Minister of Agriculture Number 63 Concerning Amendment of MOA 50/2011* (“MOA 63/2013”), which amended MOA 50/2011.<sup>161</sup> These regulations maintained the previous regime’s documentary requirements, affirming that a Recommendation and an Import Approval were required for importations of all permitted animals and animal products and that, in addition, designation as a registered importer was required for importation of cattle and beef products.<sup>162</sup>

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<sup>155</sup> MOA 50/2011, article 2(2) (JE-23).

<sup>156</sup> MOT 24/2011, article 5(1) (JE-16); MOA 50/2011, 2(1) (JE-23). From MOT 24/2011, it appeared that these documents were only required for prospective importers of the cattle and bovine products listed in Attachment 2 and not for importers of the non-bovine animals and animal products listed in Attachment 1. However, MOA 50/2011 did not distinguish between the documentary requirements for the two types of products, suggesting they may have been required for both.

<sup>157</sup> MOA 50/2011, articles 3(2), 5 (JE-23); MOT 24/2011, article 6(1) (JE-16).

<sup>158</sup> MOA 50/2011, article 3(2) (JE-23).

<sup>159</sup> MOT 24/2011, article 15(2)-(3) (JE-16).

<sup>160</sup> Regulation of the Minister of Trade Number 22/M-DAG-PER/5/2013 Concerning Provisions on the Import and Export of Animals and Animal Products, May 28, 2013 (“MOT 22/2013”) (JE-17).

<sup>161</sup> Regulation of the Minister of Agriculture Number 63/Permentan/OP.140/5/2013 Concerning Amendment of Regulation of the Minister of Agriculture Number 50/Permentan/OT.140/9/2011 Concerning Import Approval Recommendation for Carcasses, Meat, Offal, and/or Their Derivatives into the Territory of the Republic of Indonesia, May 20, 2013 (“MOA 63/2013”) (JE-24).

<sup>162</sup> MOT 22/2013, articles 4(1), 9(1) (JE-17).

94. While maintaining the application and documentation requirements, the new regulations made some significant changes to the means through which Indonesia restricted imports of animals and animal products. First, MOT 22/2013 eliminated the national allocation by the Ministry of Trade for the quantity of cattle and beef products that could be imported during each year.<sup>163</sup> Instead, the new regulations provided that the Ministry of Agriculture would set overall levels of imports of bovine carcasses, meat, and offal, based on a Ministerial Limited Coordination Meeting.<sup>164</sup> Importers were still given individual allocations each semester in their Recommendations and Import Approvals.<sup>165</sup>

95. The new regulations also introduced certain new restrictions on imports of animals and animal products. MOA 63/2013 introduced a new list of factors that the Ministry of Agriculture would consider in issuing Recommendations, which included the “holding capacity per semester” of the importer’s storage facilities, as well as the importer’s absorption of local cattle, beef carcasses, and offal produced by local slaughterhouses.<sup>166</sup> And MOT 22/2013 specified that fresh prime beef cuts could only be brought into Indonesia through three specific airports.<sup>167</sup>

96. The United States and New Zealand requested consultations on the above regulations on August 30, 2013, and consultations were held on September 23, 2013. On August 29 and 30, 2013, however, Indonesia repealed MOT 22/2013 and MOA 50/2011, as amended, and replaced them with yet another set of regulations. The regime that emerged was cited and described in the U.S. panel request and is the subject of the current dispute.

### 3. The Current Import Licensing Regulations

97. In August 2013, Indonesia issued *Regulation of the Minister of Trade Number 46 Concerning Provisions on the Import and Export of Animals and Animal Products* (“MOT 46/2013”)<sup>168</sup> and *Regulation of the Minister of Agriculture Number 84 Concerning Importation of Carcass, Meat, Offal and/or their Derivatives into the Territory of the Republic of Indonesia* (“MOA 84/2013”).<sup>169</sup> Only four months later, in December 2014, MOA 84/2013 was repealed and replaced by *Regulation of the Minister of Agriculture Number 139 Concerning Importation of Carcasses, Meats, and/or Their Processed Products into the Territory of the Republic of Indonesia* (“MOA 139/2014”), which perpetuated the essential structures and requirements of

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<sup>163</sup> See MOT 22/2013, articles 10-12 (JE-17).

<sup>164</sup> MOA 63/2013, article 4(1) (JE-24).

<sup>165</sup> See MOT 22/2013, article 33(2)-(3) (JE-17) (stating that animals and/or animal products imported with an amount, type, business unit, and/or country of origin that does not conform with the Import Approval and/or does not conform with the provisions in this Ministerial regulation must be re-exported at the importer’s expense).

<sup>166</sup> MOA 63/2013, article 4(3) (JE-24).

<sup>167</sup> MOT 22/2013, article 17 (JE-17).

<sup>168</sup> Regulation of the Minister of Trade Number 46/M-DAG/PER/8/2013 Concerning Provisions on the Import and Export of Animals and Animal Products, Aug. 30, 2013 (“MOT 46/2013”) (JE-18).

<sup>169</sup> Regulation of the Minister of Agriculture Number 84/Permentan/PD.410/8/2013 Concerning Importation of Carcass, Meat, Offal and/or their Derivatives into the Territory of the Republic of Indonesia, Aug. 30, 2013 (“MOA 84/2013”) (JE-25).

MOA 84/2013.<sup>170</sup> MOT 46/2013, as amended, and MOA 139/2014, as amended, set out Indonesia’s current import licensing regime, which is the subject of this dispute.<sup>171</sup>

98. Indonesia’s current import licensing regime for animals and animal products<sup>172</sup> maintains certain elements from the original import licensing system, including: (a) unlisted products are prohibited from being imported; (b) importers must obtain two or three permits (an RI designation, a Recommendation, and an Import Approval) to be allowed to import; and (c) the type, quantity, country of origin and port of entry of the products that can be imported are restricted to what is specified in importers’ import permits. However, there are also several new prohibitions and restrictions on animals and animal product imports. These include:

- A system of strict application windows and short permit validity periods that effectively prohibit imports during certain times;
- A Reference Price below which certain products may not be imported;
- A requirement that importers actually import 80% of the quantity listed on their import permits; and
- A requirement that beef importers absorb meat from local slaughterhouses.

99. We discuss below the application procedures of the current import licensing regime and the prohibitions and restrictions imposed through the regime that are at issue in this dispute.

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<sup>170</sup> Regulation of the Minister of Agriculture Number 139/Permentan/PD.410/12/2014 Concerning Importation of Carcasses, Meats, and/or Their Processed Products into the Territory of the Republic of Indonesia, Dec. 24, 2014 (“MOA 139/2014”) (JE-26).

<sup>171</sup> Throughout this submission, we use the phrases “current regulations” or “current regime” to refer to instruments that were cited and described in the complaining parties’ panel requests and through which the regime and requirements that are the subject of this dispute are maintained. With respect to animals and animal products, these regulations are MOT 46/2013, as amended by Regulation of the Minister of Trade No. 57/M-DAG/PER/9/2013, Sept. 26, 2013 (“MOT 57/2013”) (JE-19) and by Regulation of the Minister of Trade 17/M-DAG/PER/3/2014, Mar. 27, 2014 (“MOT 17/2014”) (JE-20), and MOA 139/2014, as amended by Regulation of the Minister of Agriculture Number 02/Permentan/PD.410/1/2015, Jan. 22, 2015 (JE-27) (“MOA 2/2015”). We refer to MOT 46/2013, as amended by MOT 57/2013 and MOT 17/2014, as “MOT 46/2013, as amended,” and to MOA 139/2014, as amended by MOA 2/2015, as “MOA 139, as amended,” and we have submitted exhibits setting out these regulations in their codified form. *See* MOT 46/2013 as amended (JE-21); MOA 139/2014, as amended (JE-28). Since the panel was established, Indonesia has issued an amendment to MOT 46/2013, MOT 41/2015 (JE-22). We refer to this regulation separately, as relevant post-panel establishment evidence that further supports a finding of a breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture as of the establishment of the panel.

<sup>172</sup> Like the original regulation MOT 24/2011, MOT 46/2013, as amended, defines “animals” as “animals or wildlife that spend all or part of their life cycle on land, in water, and/or in air, whether domesticated or in their natural habitat,” *see* MOT 46/2013, as amended, article 1(1) (JE-21), and “animal products” as “all materials originating from animals, fresh and/or processed, that are for consumption, pharmaceuticals, farming, and/or other purposes for fulfilling the needs and benefit of humans,” *see id.* article 1(6) (JE-21).

a. *Application Procedures*

100. Under the current regulations, importers must obtain two or three permits from two ministries in order to import animals and animal products into Indonesia. Three permits are required for importers of the cattle and beef meat and offals listed in Appendix I of MOT 46/2013, as amended, and MOA 139/2014, as amended, and two permits are required for importers of the non-bovine animals, meat, and offals listed in Appendix II of MOT 46/2013, as amended, and MOA 139/2014, as amended. Importers of the cattle and beef products listed in Appendix I must obtain: (1) designation as a registered importer from the Ministry of Trade (“RI designation”), (2) a Recommendation from the Ministry of Agriculture, and (3) an Import Approval from the Minister of Trade.<sup>173</sup> Importers of the non-bovine animals and products listed in Appendix II must obtain: (1) a Recommendation from the Ministry of Agriculture, and (2) an Import Approval from the Ministry of Trade.<sup>174</sup>

101. To obtain an RI designation, importers of the cattle and beef products listed in Appendix I must apply to the Minister of Trade (or to his designee, the UPP Coordinator<sup>175</sup>). An application must include seven prerequisite certificates, licenses, and proofs, including the company’s certificate of incorporation, trade business license, certificate of registration, and tax identification and importer identification numbers, as well as either proof of ownership of livestock raising facilities and a slaughterhouse (or a work contract with a slaughterhouse) or proof of ownership of cold storage facilities and refrigerated transportation.<sup>176</sup> The UPP Coordinator then conducts document and field inspections to investigate the correctness of the application materials.<sup>177</sup> Once issued, RI designations are valid for two years from the date of

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<sup>173</sup> MOT 46/2013, as amended, article 4(1) (JE-21) (stating that “Animals and Animal Products, as listed in Appendix I of this Ministerial Regulation, can only be imported by companies and/or [state-owned enterprises] that have received Confirmation as an RI-Animals and Animal Products from the Minister”), *id.* article 8 (stating that “RI-Animals and Animal Products that will import Animals and Animal Products, as described in Article 4, paragraph (1) must receive Import Approval from the Minister”); *id.* article 11(1) (setting out the requirements for RI designees to apply for an import approval); MOA 139/2014, as amended, article 4 (JE-21) (stating that all the institutions that seek to import animals and animal products “must obtain an importation permit from the Minister of Trade,” which will be issued only “after [prospective importers] obtain a Recommendation from the Director of Veterinary Public Health and Post-Harvest,” and that such recommendation must be an attachment to the import approval).

<sup>174</sup> MOT 46/2013, as amended, article 9 (JE-21) (stating that animals and animal products listed in Appendix II “can only be imported by a company that has received Import Approval from the Minister”); *id.* article 11(2) (setting out the requirements for companies seeking to import animals and animals products to apply for an import approval); MOA 139/2014, as amended, article 4 (JE-28) (stating that all the institutions that are permitted to import animals and animal products and that seek to do so “must obtain an importation permit from the Minister of Trade,” which will be issued only “after [prospective importers] obtain a Recommendation from the Director of Veterinary Public Health and Post-Harvest,” and that such recommendation must be an attachment to the importation permit).

<sup>175</sup> MOT 46/2013, as amended, article 4(2) (JE-21).

<sup>176</sup> MOT 46/2013, as amended, article 5(1) (JE-21).

<sup>177</sup> MOT 46/2013, as amended, article 5(3)-(4) (JE-21).

issuance<sup>178</sup> but can be suspended or revoked if the importer does not comply with the provisions of MOA Regulation 139/2014 or MOT Regulation 46/2013.<sup>179</sup>

102. To obtain a Recommendation, importers of the animals and animal products listed in Appendix I and Appendix II of MOT 46/2013 and MOA 139/2014 must submit an application to the Ministry of Agriculture. The application must include thirteen prerequisite licenses and documents, including the importers' RI designation, a letter stating its ownership of cold storage and refrigerated transportation (accompanied by supporting documentation), its import realization report from the previous period, and evidence of local beef purchases verified by a provincial official or municipality.<sup>180</sup> Recommendations are issued four times a year – in March, June, September, and December (for the following year).<sup>181</sup> Importers can apply for Recommendations only during these months.<sup>182</sup> In practice, application periods are not always open for the whole month and have been open for as short a time as two days.<sup>183</sup>

103. To obtain an Import Approval, importers of the animals and animal products listed in Appendix I or Appendix II of the regulations must apply to the Ministry of Trade. An application must include the importer's Recommendation from the Minister of Agriculture and

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<sup>178</sup> MOT 46/2013, as amended, article 6 (JE-21).

<sup>179</sup> See MOT 46/2013, as amended, articles 26, 27 (JE-21); MOA 139/2014, as amended, article 39 (JE-28).

<sup>180</sup> MOA 139/2014, as amended, article 24 (JE-28). A complete Recommendation application submitted by a business operator, state-owned enterprise, or regional government-owned enterprise must include the importer's (a) identity card and/or identification as the head of the company; (b) tax identification number; (c) trade business license; (d) registration certificate or business license in the field of livestock and animal health; (e) a certificate of incorporation, with its most recent amendments; (f) veterinary control number; (g) confirmation as an RI of animal products; (h) a stamped letter attesting to ownership of cold storage and cold transportation facilities complete with supporting proof/documents; (i) a recommendation from a provincial Agency; (j) a letter of appointment or work contract from the company head showing employment of a competent veterinarian; (k) import realization report from the previous period; (l) for beef meat importers, proof of local beef purchases verified by the provincial Agency and/or regency/municipality from which the local beef originates; and (m) a stamped letter attesting to the accuracy and validity of all documents submitted. *Id.* article 24(1) (JE-28); see *id.*, Format – 1, "Application for a Technical Recommendation of Veterinary Public Health" (JE-28). Different requirements apply to Recommendation applications from social institutions and representatives of foreign countries or international institutions. See *id.* article 24(2)-(3) (JE-28).

<sup>181</sup> MOA 139/2014, as amended, article 29 (JE-28). Recommendations are issued on a rolling basis during these months. *Id.*, article 25 (JE-28).

<sup>182</sup> MOA 139/2014, as amended, article 23(1) (JE-28). One limited exception to this is that "social institutions" and representatives of foreign countries and international institutions can apply for Recommendations at any time. *Id.* article 23(2) (JE-28).

<sup>183</sup> See Thomas Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015*, Dec. 30, 2014 (Exh. US-36) (describing the Minister of Agriculture's announcement on December 29 that the on-line application system for import recommendations for beef and cattle will be open from December 29 to 31); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 9, 2014 (Exh. US-37) (announcing the closure of the application window for import recommendations); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 29, 2014 (Exh. US-38) (announcing the opening of online application system for import recommendations from December 29-31).

(for importers of Appendix I products) their RI designation.<sup>184</sup> Import Approvals are issued for one of four three-month periods, January to March, April to June, July to September, or October to December.<sup>185</sup> They are issued on a date “at the beginning” of the period that is generally not announced in advance.<sup>186</sup> Applications for Import Approvals can be submitted during the month preceding the start of the period, i.e., December, March, June, and September.<sup>187</sup> However, importers often have less than the full month to submit their applications because they cannot apply for an Import Approval until after they have received a Recommendation for that period.

*b. Only Products Set Out in a Positive List May be Imported*

104. Like the original import licensing regulations, the current regime allows the importation of only the animals and animal products listed in the appendices to the Ministry of Trade and Ministry of Agriculture regulations, MOT 46/2013 and MOA 139/2014. Unlisted animals and animal products are banned.<sup>188</sup>

105. Article 2 of MOT 46/2013, as amended, states explicitly that “the types of Animals and Animal Products that can be imported are included in Appendix I and Appendix II.”<sup>189</sup> The titles of MOT 46/2013 Appendix I and Appendix II – “Types of Animals and Animal Products that Can Be Imported Using Confirmation as a Registered Importer of Animals and Animal Products and Import Approval” and “Animals and Animal Products That Can Be Imported Using Import Approval” – confirm the rule set out in Article 2.<sup>190</sup>

106. Similarly, Article 8 of MOA 139/2014, as amended, states that the bovine meats and the non-bovine carcasses, meats, and processed products “that can be imported” are listed in Appendices I and II respectively.<sup>191</sup> Recommendation applications that do not comply with the type requirements, as set out in Appendix I and II, will not be granted.<sup>192</sup> As in MOT 46/2013,

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<sup>184</sup> MOT 46/2013, as amended, article 11(1)-(2) (JE-21).

<sup>185</sup> MOT 46/2013, as amended, article 12(1)-(3) (JE-21).

<sup>186</sup> MOT 46/2013, as amended, article 12(2) (JE-21).

<sup>187</sup> MOT 46/2013, as amended, article 12(1) (JE-21).

<sup>188</sup> The one limited exception to this requirement is that the Indonesian government can assign the Bureau of Logistics (BULOG) to import the animals and animal products listed in MOT 46/2013 Attachment I (including secondary cuts of beef) in order to “ensure food security.” See MOT 46/2013, as amended, article 18(1) (JE-21); MOA 139/2014, as amended, article 23(3) (JE-28). In that event, the Minister of State Owned Enterprises makes the assignment based on proposals from the Minister of Trade, and Recommendation(s) and Import Approval(s) are still required. See MOT 46/2013, as amended, article 18(2) (JE-21); MOA 139/2014, as amended, article, 24(4) (JE-28). MOT 41/2015, amending MOT 46/2013, revised this exception slightly by providing that the Government can appoint state-owned enterprises (not only BULOG) to import animals and animal products “to ensure food security and price stability.” See MOT 41/2015, article 18 (JE-22).

<sup>189</sup> MOT 46/2013, as amended, article 2(2) (JE-21).

<sup>190</sup> See MOT 46/2013, as amended, Appendix I, Appendix II (JE-21).

<sup>191</sup> MOA 139/2014, as amended, article 8 (JE-28).

<sup>192</sup> MOA 139/2014, as amended, article 26 (stating that a recommendation application will be rejected if it does not meet the requirements described in article 8, *inter alia*) (JE-28).

the titles of Appendix I and II to MOA 139/2014 – “Bovine Meat That Can Be Imported into the Territory of the Republic of Indonesia” and “Non-Bovine Carcasses and/or Meat as Well as Processed Meat Products that Can Be Imported into the Territory of the Republic of Indonesia” – confirm that MOA 139/2014, as amended, sets out a positive list of the animals and animal products that can be imported.<sup>193</sup>

107. Further, because both a Recommendation from the Ministry of Agriculture and an Import Approval from the Ministry of Trade are required to import animals and animal products, a type of animal or animal product must be listed in the appendices of both MOA 139/2014 and MOT 46/2013 for importation of that animal or animal product to be permitted.<sup>194</sup> Animals and animal products that are not listed in the appendices to *both* these regulations cannot be imported.

108. The importation of certain types of animals and animal products has been prohibited by Indonesia’s import licensing regulations since the original 2011 regulations and continues to be prohibited under MOT 46/2013, as amended, and MOA 139/2014, as amended. As shown by comparing Indonesia’s import licensing regulations with its WTO Tariff Schedule,<sup>195</sup> the HS numbers for numerous categories of products have not been listed in any of Indonesia’s import licensing regulations since 2011. Examples of these products include: all chicken cuts and offal; all turkey cuts and offal; duck fatty liver; all duck meat and edible offal; all geese carcasses and cuts; all guinea fowl carcasses and cuts; and bovine carcasses and half-carcasses.<sup>196</sup>

109. When MOA 139/2014 was issued in December 2014, several more bovine meat products were banned. Specifically, all secondary cuts of beef were omitted from the list of products whose importation is permissible.<sup>197</sup> Secondary cuts of beef include numerous products popular

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<sup>193</sup> MOA 139/2014, as amended Appendix I, Appendix II (JE-28).

<sup>194</sup> MOA 139/2014, as amended, articles 4(2)-(4), 7, 8 (JE-28) (requiring both a recommendation and an import approval for all imports of animals and animal products and stating that the product type requirements set out in Appendix I and II are integral parts of MOA 139/2014); MOT 46/2013, as amended, article 11(1)-(2) (JE-21) (specifying that an import approval is required for all importations of animals and animal products and that a recommendation is a prerequisite for obtaining an import approval); *id.* article 2 (JE-21) (specifying that the types of animals and animal products that can be imported are set out in the appendices, which are an integral part of the regulation).

<sup>195</sup> See Indonesia, Applied MFN Tariff Schedule: Live Animals, Meat and Edible Meat Offal (2014), *WTO Tariff Download Facility*, <http://tariffdata.wto.org/ReportersAndProducts.aspx> (accessed Oct. 21, 2015) (Exh. US-39).

<sup>196</sup> The HS numbers for these products – HS 0207.14 (chicken cuts and offal, frozen), HS 0207.26 (turkey cuts and offal, fresh or chilled), HS 0207.27 (turkey cuts and offal, frozen), HS 0207.43 (duck fatty livers, fresh or chilled), HS 0207.44 (duck meat and edible offal, other, fresh or chilled), HS 0207.45 (duck meat and edible offal, other, frozen), HS 0207.51-55 (all gees carcasses and cuts), HS 0207.60 (all guinea fowl carcasses and cuts, HS 0201.10 (bovine carcasses and half-carcasses, fresh or chilled), and HS 0202.10 (bovine carcasses and half-carcasses, frozen) – have not been listed in any of Indonesia’s import licensing regulations since 2011. See MOT 24, Attachment I, Attachment II (JE-16); MOA 50/2011, Attachment I, Attachment II (JE-23); MOT 22/2013, Appendix I, Appendix II (JE-17); MOA 63/2013, Appendix I, Appendix II (JE-24); MOA 84/2013, Appendix I, Appendix II (JE-25); MOT 46/2013, Appendix I, Appendix II (JE-21); MOA 139/2014, as amended, Appendix I, Appendix II (JE-28).

<sup>197</sup> Compare MOA 139/2014, as amended, Appendix I (JE-28) (listing only “prime cuts” of fresh/chilled and frozen bovine meat) with MOA 84/2013, Appendix I (JE-25) (listing “prime cuts” and “secondary cuts” of

in Indonesia and in high demand generally, including rosbiff (center cut sirloin), rump cap, rib meat, stir fry, flank steak, skirt steak, and chuck, among others.<sup>198</sup> Certain manufacturing meat cuts and edible beef offals such as liver were also omitted.<sup>199</sup>

110. The effect on imports was immediate.<sup>200</sup> In responding to one importer's Recommendation application for importation of frozen beef short-plate, the Directorate General of the Ministry of Agriculture confirmed the new prohibitions, explaining that secondary cuts of beef were excluded from the attachment to MOA 139/2014 listing the type of beef that can be imported into Indonesia and, therefore, cannot be imported.<sup>201</sup> The same is true for other products that were removed from the list of permitted products with the issuance of MOA 139/2014, such as beef livers. Trade data on imports into Indonesia compiled by Statistics Indonesia (*Badan Pusat Statistik*, "BDS"), an independent government institute responsible for conducting statistical surveys in Indonesia, shows that importation of frozen beef liver stopped abruptly in 2015, when MOA 139/2014 came into effect, going from an average of 241,638 kilograms per month in 2014 to 6,960 kilograms in January 2015, and to zero thereafter.<sup>202</sup>

*c. Application Windows and Validity Periods of Required Import Documents*

111. Importers are able to submit applications for Recommendations and Import Approvals only during a period of less than a month immediately prior to the beginning of each three-month import period.<sup>203</sup> The application window for Recommendations is open during some period

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fresh/chilled and frozen bovine meat) and MOT 46/2013, Appendix I (JE-21) (listing "prime cuts" and "secondary cuts" of fresh/chilled and frozen bovine meat).

<sup>198</sup> See MOA 84/2013, Appendix I (JE-25), MOT 46/2013, Appendix I (JE-21) (listing numerous secondary cuts of beef omitted from MOA 139/2014, as amended, including rump cap, bottom sirloin, rosbiff, topside/inside meat, eye round, outside meat, silverside, rib meat, stir fry, flank steak, thick skirt, thin skirt, thick flank, thin flank, chuck roll, and chuck).

<sup>199</sup> Compare MOA 139/2014, as amended, Appendix I (JE-28) (not listing certain cuts of manufacturing meat (hindquarter meat, hindquarter, forequarter meat, forequarter, fore and hind meat, fore & hind, and chuck meat) or edible offal of bovine animals (lips, head meat, tendons, liver, and heart) with MOA 84/2013, Appendix I (JE-25) (listing such cuts) and MOT 46/2013, Appendix I (JE-21) (same).

<sup>200</sup> See Thomas Wright, U.S. Department of Agriculture Foreign Agricultural Service, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2, July 27, 2015 (Exh. US-40) (noting that MOA 139/2014 instituted a "ban on 'secondary cuts' and offals," including "livers, hearts, and various muscle cuts"); Taylor, "Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry," *Reuters* (Exh. US-8) (noting that, as of January 2015, the Indonesian government has banned imports of offal and secondary cuts of beef).

<sup>201</sup> Letter from the Directorate General to GM PT Multirasa Nasantara in Jakarta in Response to an Application on the Importation of Frozen Beef-Short Plate, Feb. 4, 2015 ("MOA 139/2014 Letter") (Exh. US-41) (stating: "In MOA Regulation No 139/2014, Secondary Cut is excluded from attachment for type of beef that allowed to be imported into Indonesian territory including Brisket Point End and Brisket Navel End.").

<sup>202</sup> See "Query: Importation of Bovine Livers, Frozen, from 2011-2015, Monthly," *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-42).

<sup>203</sup> MOA 139/2014, as amended, article 29 (JE-28); MOT 46/2013, as amended, article 12(1) (JE-21). In June 2015, after the complainants' panel request, the MOT established one limited exception to this rule, namely

(not of consistent or predictable timing or duration) during the month prior to the start of a validity period, i.e., in December, March, June, and September.<sup>204</sup> For the first quarter of 2015, Recommendation applications were accepted only from December 29-31 of 2014.<sup>205</sup> For the last quarter of 2015, applications were accepted only from September 1-10.<sup>206</sup> The application window for Import Approvals is also considerably shorter than a month because importers cannot apply for Import Approvals until they receive a Recommendation for that period.<sup>207</sup>

112. Import Approvals are valid for one three month period – January to March, April to June, July to September, or October to December,<sup>208</sup> and they are issued on a date (usually not announced in advance) “at the beginning” of each period.<sup>209</sup> Imports must be shipped, arrive, and clear customs during the period for which the Import Approval is valid. Specifically, each Import Approval specifies that the “number and date” of the importer’s Import Approval must be written on the Certificate of Health issued by the product’s country of origin.<sup>210</sup> This means that the Certificate of Health *cannot be issued*, and thus the goods *cannot ship*, until after the Import Approvals for that period have been issued. And imports must clear customs in Jakarta before the end of the period for which the Import Approval is valid or they will be re-exported.<sup>211</sup>

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that applications for import approvals for the importation of “mother cows,” as listed in Appendix I of MOT 46/2013, can be submitted at any time. MOT 41/2015, article 12B (JE-11).

<sup>204</sup> MOA 139/2014, as amended, article 29 (JE-28).

<sup>205</sup> See Wright, *GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015*, Dec. 30, 2014 (Exh. US-36) (describing the Minister of Agriculture’s announcement on December 29 that the on-line application system for import recommendations for beef and cattle will be open from December 29 to 31); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 9, 2014 (Exh. US-37) (announcing the closure of the application window for import recommendations); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 29, 2014 (Exh. US-38) (announcing the opening of online application system for import recommendations from December 29-31).

<sup>206</sup> See Sistem Informasi Rekomendasi Perizinan (SIMREK) Login Page (accessed Sept. 17, 2015) (Exh. US-56).

<sup>207</sup> MOT 46/2013, as amended, article 11(1)-(2) (JE-21) (stating that, to receive and import approval, an importer must attach its recommendation from the Ministry of Agriculture).

<sup>208</sup> MOT 46/2013, as amended, article 12(1)-(2) (JE-21).

<sup>209</sup> MOT 46/2013, as amended, article 12(2) (JE-21).

<sup>210</sup> See Ministry of Trade, Import Approval for Beef, Sept. 25, 2014 (Exh. US-43).

<sup>211</sup> See Ministry of Trade, Import Approval for Beef (Exh. US-43) (stating that the import approval is valid for the last period of 2014 and that the date of the customs registration notice for the goods must be within the Import Approval’s validity period); MOT 46/2013, as amended, article 30(2) (JE-21) (stating that imports not in accordance with the provisions in this Ministerial Regulation will be re-exported). The one potential exception to this rule is that the validity period of an Import Approval can be extended, on the approval by the Minister of Trade, for products that were shipped prior to the end of the validity period but failed to clear customs by that date. MOT 46/2013, as amended, article 12A (JE-21). However, this extension is not automatic, is for a maximum of 30 days, and can only be requested one time for each importation period. *Id.*, article 12A(1)-(2), (5) (JE-21). Further, extension is not possible for Import Approvals for the fourth quarter of a given year (October to December). *Id.*, article 12A(4) (JE-21).

113. As a result, during each validity period, exporters cannot start shipping until after a validity period begins and must stop shipping long enough before the period's end for their goods to arrive in Indonesia and clear customs by the last day. For countries, like the United States, that are far from Indonesia, this means that there is a four to six week block at the end of each import period when exporters cannot ship their products to Indonesia because they will not arrive in time for the current validity period, and Import Approvals for the next validity period have not been issued.<sup>212</sup> Four to six weeks each quarter means that there are approximately twenty weeks out of the year (five months) where U.S. exporters cannot ship animals and animal products to Indonesia, due to constraints imposed by the structure of the import licensing regime.

114. These constraints are illustrated by the following example of an importer seeking to import boneless frozen secondary beef cuts from the United States.<sup>213</sup> Wishing to import U.S. beef during the last quarter of 2014 (October to December), the importer applied for a Recommendation at the beginning of September. The importer received a Recommendation on September 11 and then applied for an Import Approval, which the importer received on September 25. (The importer was fortunate in that, contrary to other periods, application windows for Recommendations and Import Approvals were actually open during the month of September and that Import Approvals were issued “at the beginning of the period.” For example, in the next period, the first quarter of 2015, the Recommendation window was not open until December 29-31, and Recommendations and Import Approvals were issued in January, after the period had started.<sup>214</sup>)

115. After the importer received an Import Approval, the importer could start to place orders with U.S. exporters. The exporters could then begin the process of obtaining the necessary Certificate of Health in the United States, transporting the products to port, and shipping them to Indonesia. The exporters would have to stop shipping around mid-to-late-November, however, to allow time for their goods to reach Indonesia and clear customs by the last day of the period on December 31, 2014.<sup>215</sup> And, during that time, they could not begin shipping for the next period, as Import Approvals would not be issued until January. For the remaining month or month and a half of the period, therefore, U.S. beef could not be shipped to Indonesia at all.

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<sup>212</sup> Letter to Mr. Bob Macke, Acting Deputy Administrator of the Foreign Agriculture Service, U.S. Department of Agriculture, from Representatives of the American Meat Industry, at 1, Oct. 27, 2015 (“Meat Industry Letter”) (Exh. US-44).

<sup>213</sup> See Ministry of Trade, Import Approval for Beef (Exh. US-43).

<sup>214</sup> See Wright, *GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015* (Exh. US-36); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 9, 2014 (Exh. US-37); Letter from Directorate General of Livestock and Animal Health Services (DGLAHS) to Cattle and Meat Importers, Dec. 29, 2014 (Exh. US-38).

<sup>215</sup> Meat Industry Letter, at 1 (Exh. US-44) (stating that Indonesia's quarterly permit system “creates a very short time for importers to get their quota assigned, be approved for the import license, and allow the product to arrive in Indonesia before the end of the quarter,” and “effectively allows for purchasing activity to take place only within the first several weeks of every quarter”).

*d. Requirements for the Quantity, Type, Country of Origin, and Port of Entry of Products Imported During Each Period*

116. As discussed above, two or three types of permits – an RI designation (for Appendix I products), a Recommendation (for Appendix I and II products), and an Import Approval (for Appendix I and II products) – are required for importation of animals and animal products into Indonesia.<sup>216</sup> Once issued, these documents specify the type (by HS code number, product type, and cut type),<sup>217</sup> quantity,<sup>218</sup> country of origin,<sup>219</sup> and port of entry<sup>220</sup> of the products that the holder is allowed to import during the relevant three-month validity period.

117. During each validity period, importers are not permitted to import animals and animal products other than those specified on their Recommendations and Import Approvals. Under MOA 139/2014, as amended, importers are “prohibited from importing types/categories of carcasses, meat, and/or their processed products other than what is included in their Recommendation.”<sup>221</sup> They are also prohibited from requesting changes to the elements specified on their Recommendations once they have been issued.<sup>222</sup>

118. Importers who violate these provisions are subject to sanction by having their Recommendation revoked and becoming ineligible to apply for Recommendations in the future.<sup>223</sup> Article 30 of MOT 46/2013, as amended, states that imports “whose quantity, type, business unit, and/or country or origin is not in accordance with their Import Approval . . . will be re-exported,” with the cost of re-export being borne by the importer.<sup>224</sup> Importers who do not

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<sup>216</sup> MOT 46/2013, as amended, articles 4(1) (requiring an RI designation for all importations of the animals and animal products listed in Appendix I), 8 (requiring an import approval for all RI designee that will import animals and animal products), 11(1), and 9(1) (stating that the animals and animal products listed in Appendix II can only be imported by a company that has received an import approval) (JE-21); MOA 139/2014, as amended, article 4 (JE-28) (stating that all the institutions that are permitted to import animals and animal products and that seek to do so “must obtain an importation permit from the Minister of Trade,” which will be issued only “after [prospective importers] obtain a Recommendation from the Director of Veterinary Public Health and Post-Harvest,” and that such recommendation must be an attachment to the importation permit).

<sup>217</sup> MOA 139/2014, as amended, article 30(f) (JE-28); Ministry of Trade, Import Approval for Beef, Sept. 25, 2014 (Exh. US-43)

<sup>218</sup> MOA 139/2014, as amended, article 28 (JE-28); MOT 46/2013, as amended, article 30 (JE-21); Ministry of Trade, Import Approval for Beef (Exh. US-43).

<sup>219</sup> MOA 139, article 30(d) (JE-28); Ministry of Trade, Import Approval for Beef (Exh. US-43)

<sup>220</sup> MOA 139/2014, as amended, article 30(h) (JE-28); Ministry of Trade, Import Approval for Beef (Exh. US-43).

<sup>221</sup> MOA 139/2014, as amended, article 33(b) (JE-28).

<sup>222</sup> MOA 139/2014, as amended, article 33(a) (JE-28).

<sup>223</sup> MOA 139/2014, as amended, article 39(e) (JE-28).

<sup>224</sup> MOT 46/2013, as amended, article 30(2)-(3) (JE-21). There is a limited exception to this requirement for the personal belongings of passengers and transportation crew members, the belongings of foreign representatives, and “cross border” goods. *See* MOT 46/2013, as amended, article 31(1) (JE-21).

comply with MOT 46/2013, as amended, including the provisions concerning Import Approvals, are subject to sanction.<sup>225</sup>

119. The effect of these requirements is that importers are required to predict in advance precisely the products that they will want to import during the subsequent three-month import period, and they are unable to make any adjustments to those products once the period begins, as would be the general commercial practice. If, for example, there is an increase in demand in Indonesia for a particular product, importers cannot substitute that product for any other product listed on their Recommendation or Import Approval or bring in any additional amounts of that product. If there is a port workers' strike in the country of origin listed on an importer's permits, or any other event causing a supply shortage in that country, the importer cannot substitute products from another country. Similarly, if there are labor disruptions or other long delays at the port of entry listed on the permits, the importer cannot switch to another Indonesian port. In short, for three months at a time, importers are wholly unable to respond to market forces or to other events that affect their business.

120. Thus, once an import period has begun, the outstanding Recommendations and Import Approvals restrict all imports of animals and animal products permitted during that period to those specified in the license. All other imports of animals and animal products are prohibited, and importers cannot apply for new Recommendations or Import Approvals or change the products listed on their permits in response to changes in global or Indonesian supply or demand or to any other relevant events.

*e. The Realization Requirement*

121. Under the current import licensing regulations, would-be importers of the animals and animal products listed in Appendix I (i.e. cattle and beef products) are required to prove that they actually imported ("realized") at least 80 percent (by weight) of the products specified on their Import Approvals for the previous year. Importers who do not satisfy this requirement cannot obtain further Recommendations or Import Approvals for up to two years.

122. Under MOT 46/2013, as amended, RI designees (i.e., importers permitted to apply to import cattle and bovine animal products) are required to import "at least 80%" of the products covered by their Import Approvals for each year.<sup>226</sup> To implement this requirement, RI designees are required to submit monthly "Import and Export Realization Reports" setting out all of their imports of animals and animal products.<sup>227</sup> In these reports, importers must specify, *inter alia*, their Import Approval number and total quantity permitted, the tariff number and item description of each product they are authorized to import, the volume and value of their imports of each type of product, and the balance of each type of product remaining under their Import

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<sup>225</sup> MOT 46/2013, as amended, article 30(1) (JE-21).

<sup>226</sup> MOT 46/2013, as amended, article 13 (JE-21) (stating that "RI-Animals and Animal Products who have received Import Approval, as described in Article 11, paragraph (3), item (a), are required to realize at least 80% (eighty percent) of imports of Animals and Animal Products for 1 (one) year").

<sup>227</sup> MOT 46/2013, as amended, article 25 (JE-21); *id.* Appendix IV, Import and Export Realization Report – Animals and Animal Products (JE-21).

Approval.<sup>228</sup> Import realization reports must be submitted every month to the Ministry of Trade, the Ministry of Agriculture, and the Head of the Food and Drug Control Agency.<sup>229</sup> RI designees also must attach a photocopy of their “Import Realization Control Card,” a form that a Customs and Excise official must fill in with the volume and classification of imports, sign, and stamp each time imports are realized.<sup>230</sup> An RI designee that does not fulfill the 80% realization requirement, or does not file the import realization report three times, has its RI designation suspended (for an undefined period).<sup>231</sup> If an importer does not fulfill the realization obligation twice, its RI designation is revoked, and it cannot reapply for at least two years.<sup>232</sup>

123. This requirement gives importers a powerful incentive to ensure that they do not apply for import approvals for greater quantities of products than they are *certain* they can actually import. Like importers of horticultural products, in an inherently uncertain environment such as international trade in agricultural products, this realization requirement causes importers to reduce the quantities of products for which they apply, thereby restricting the volume of products that they can import into Indonesia.

*f. Requirements Concerning the Uses for Which Animals and Animal Products May Be Imported*

124. Like the original import licensing regime, the current regime, as set out by MOT 46/2013, as amended, and MOA 139/2014, as amended, permits the importation of animals and animal products only for certain specified purposes.

125. MOT 46/2013, as amended, limits the uses for which all animals, as well as the animal products listed in Appendix I, can be imported. Specifically, MOT 46/2013, as amended, provides that animals can be imported only in order to improve genetic quality and diversity, develop science and technology, overcome domestic shortfalls, or fulfill research and development needs.<sup>233</sup> MOT 46/2013, as amended, also states that importation of Appendix I animal products (i.e., cattle carcasses and beef meat and offals) is permitted only “for the use and distribution of manufacturing, hotels, restaurants, catering, and/or other special needs.”<sup>234</sup> Thus importation of Appendix I products for sale to consumers (in either modern grocery stores or traditional Indonesian markets) is prohibited.

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<sup>228</sup> MOT 46/2013, Appendix IV (JE-21).

<sup>229</sup> MOT 46/2013, as amended, article 25(3) (JE-21).

<sup>230</sup> MOT 46/2013, as amended, article 25(1)(b) (JE-21).

<sup>231</sup> MOT 46/2013, as amended, article 26 (JE-21).

<sup>232</sup> MOT 46/2013, as amended, articles 27(a), 29 (JE-21).

<sup>233</sup> MOT 46/2013, as amended, article 3(1) (JE-21) (stating that animals can be imported in order to: (a) improve genetic quality and diversity; (b) develop science and technology; (c) overcome domestic deficiencies of seeds, breeders and/or feeders; and/or (d) to fulfill research and development needs).

<sup>234</sup> MOT 46/2013, as amended, article 17 (JE-21).

126. MOA 139/2014, as amended, establishes the same requirement for Appendix I products and also restricts the purposes for which Appendix II products (i.e., non-bovine animals, meat, and offals) may be imported. Like MOT 46/2013, MOA 139/2014, as amended, provides that bovine meat may be imported for use in “hotel, restaurant, catering, manufacturing, and other special needs.”<sup>235</sup> “Other special needs” includes gifts for public purposes, the needs of foreign countries or international institution representatives in Indonesia, research and development, and sample goods not for trade.<sup>236</sup> It does not include sale to consumers. MOA 139/2014, as amended, provides that Appendix II products may be imported for the same purposes as Appendix I products and, additionally, for sale in “modern markets” (i.e. supermarkets or convenience stores).<sup>237</sup> However, importation for sale in traditional markets, where the majority of Indonesian consumers do their food shopping, is still not permitted.<sup>238</sup>

127. These requirements are enforced in several ways. First, MOT 46/2013, as amended, requires importers with an RI designation who have obtained an Import Approval for Appendix I products to submit a distribution report each month to the Ministries of Agriculture and Trade.<sup>239</sup> In these reports, the RI designee specifies how the products it imported during the previous month were distributed in Indonesia.<sup>240</sup> For beef, the options are limited to sale for “manufacturing” or “hospitality” (i.e., restaurants, catering, or hotels), and the importer is required to provide the name and address of the industrial or hospitality purchaser, as well as the price at which the products were sold.<sup>241</sup> If an importer fails to submit this report three times or more, the importer’s RI designation is suspended (for an unspecified period),<sup>242</sup> which would render the importer unable to import Appendix I products.<sup>243</sup>

128. Second, importers that violate the provision of MOA 139/2014, as amended, concerning uses for which animals and animal products may be imported are subject to sanction by

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<sup>235</sup> MOA 139/2014, as amended, article 32(1) (JE-28).

<sup>236</sup> MOA 139/2014, as amended, article 32(3) (JE-28). Additionally, as described above, state-owned enterprises may, pursuant to special authorization from the Minister of State-Owned Enterprises, based on proposals from the Ministers of Agriculture, Trade, and/or Social Services, import Appendix I products for the purpose of price stabilization or disaster relief. MOA 139/2014, as amended, article 32(4) (JE-28).

<sup>237</sup> MOA 139/2014, as amended, article 32(2) (JE-28).

<sup>238</sup> See Rohit Razdan et al., McKinsey & Co, *The Evolving Indonesian Consumer*, at 16 (November 2013) (Exh. US-47) (stating that, while modern markets’ share of trade continues to rise, “traditional retail channels, including mom-and-pop stores (warungs) and wet markets, still dominate the retail landscape in Indonesia”); Arief Budiman et al., McKinsey & Co., *The New Indonesian Consumer*, at 11 (December 2012) (Exh. US-48) (stating that, as of 2011, “retail sales through traditional channels, including mom-and-pop and wet markets, account for an estimated 70 percent of the market” and that, “[f]or general food and beverage . . . the traditional channel remains important, with only about half of consumers preferring modern retail”).

<sup>239</sup> MOT 46/2013, as amended, article 25(2)-(3) (JE-21).

<sup>240</sup> MOT 46/2013, as amended, Appendix V (for cattle), and Appendix VI (for beef) (JE-21).

<sup>241</sup> See MOT 46/2013, as amended, Appendix VI (JE-21).

<sup>242</sup> MOT 46/2013, as amended, article 26 (JE-21).

<sup>243</sup> See MOT 46/2013, as amended, article 4(1) (JE-21).

revocation of their Recommendation and ineligibility for future Recommendations, as well as possible revocation of their Import Approvals and, if applicable, their RI designation.<sup>244</sup>

*g. The Domestic Purchase Requirement*

129. Under MOA 139/2014, as amended, importers that import beef (“large ruminant meat”) are required to “absorb” (i.e., purchase) a certain amount of beef from local slaughterhouses in order to import beef into Indonesia.<sup>245</sup> Specifically, beef importers must purchase beef from local slaughterhouses equivalent to three percent (by volume) of the beef that they import.<sup>246</sup> Local beef purchases are limited to specific abattoirs and only male cattle qualify toward the requirement, which has made it difficult for importers to find and purchase Indonesian beef equivalent to three percent of the quantity that they would otherwise import.<sup>247</sup>

130. The purchase of local beef must be verified by the provincial or municipal agency from which the beef originates.<sup>248</sup> In applying for a Recommendation, importers must demonstrate that they have met this requirement by submitting proof of local beef purchases, verified by the provincial agency or the municipality from which the beef originates.<sup>249</sup> If importers do not comply with the domestic purchase requirement, or with the requirement to provide proof of their purchases of local beef, their Recommendation applications will be rejected.<sup>250</sup> Additionally, importers that do not comply with the requirement and the related verification requirements are subject to sanction by revocation of their RI designation, Recommendation, and Import Approval, as well as by ineligibility for any future Recommendation.<sup>251</sup>

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<sup>244</sup> MOA 139/2014, 39(d) (JE-28) (stating that importers who violate article 32 of MOA 139/2014 (on the intended uses of Appendix I and Appendix II products) “will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation”).

<sup>245</sup> MOA 139/2014, as amended, article 5(1) (JE-28) (stating: “Business Operators, State-Owned Enterprises, or Regional Government-Owned Enterprises, as described in Article 4, that import large ruminant meats must absorb local beef from slaughter houses that have a Veterinary Control Number”). Thus, social institutions and representatives of foreign countries or institutions appear to be exempted from this requirement.

<sup>246</sup> Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40); see also, Ministry of Agriculture, “Absorption Presentation Powerpoint,” Aug. 25, 2015 (Exh. US-57).

<sup>247</sup> Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

<sup>248</sup> MOA 139/2014, as amended, article 5(2) (JE-28).

<sup>249</sup> MOA 139/2014, as amended, article 24(1)(l) (JE-28).

<sup>250</sup> MOA 139/2014, as amended, article 26 (JE-28) (stating that if a recommendation application does not meet the requirements described in article 5, *inter alia*, the application will be rejected).

<sup>251</sup> MOA 139/2014, as amended, article 39(b)-(c) (JE-28) (stating that importers that violate the provisions of article 5 or article 24(1)(l), *inter alia*, “will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation”).

*h. The Reference Price Requirement*

131. The current import regime conditions importation of all Appendix I animals and animal products on the domestic Indonesian market price of secondary cuts of beef remaining above a set figure. Specifically, MOT 46/2013, as amended, states that if the market price of secondary cuts of beef is below a certain “Reference Price,” then imports of Appendix I animals and animal products are “postponed” (that is, prohibited) until the market price again reaches the Reference Price.<sup>252</sup> MOT 46/2013, as amended, sets the Reference Price at Rp 76,000.00/kg (seventy-six thousand rupiah per kilogram), but provides that this could be reevaluated and revised at any time by a Beef Price Monitoring Team within the Ministry of Trade.<sup>253</sup> Thus, if the Indonesian market price of secondary cuts of beef falls below that figure, importation of all cattle, beef meat (primary as well as secondary cuts), and beef offals will not be allowed until the price of secondary cuts rises about Rp 76,000.00 per kg.

132. In addition to the various restrictions described above, therefore, imports of all cattle and beef products are prohibited outright whenever the market price of secondary cuts falls below a value set by the Indonesian government.

**IV. LEGAL DISCUSSION**

133. In this Section, the United States explains how the restrictive import measures described in the previous section are inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.

134. First, Part A sets out the relevant legal standards.

135. Parts B and C then demonstrate how the prohibitions and restrictions imposed by Indonesia’s import licensing regime for horticultural products, as well as by the regime as a whole, are inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.

136. Parts D and E make the same showings concerning the prohibitions and restrictions imposed by Indonesia’s import licensing regime for animals and animal products and by that regime as a whole.

137. Part F addresses the Indonesian laws that condition imports of food on the insufficiency of domestic production to meet domestic demand, and explains why those laws are also inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture.

138. Finally, should the Panel analyze the aspects of Indonesia’s import licensing measures that establish the application windows and validity periods under the Import Licensing

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<sup>252</sup> MOT 46/2013, as amended, article 14(1) (JE-21).

<sup>253</sup> MOT 46/2013, as amended, article 14(3) (JE-21).

Agreement, Part G demonstrates that those measures are inconsistent with Article 3.2 of that agreement.

## A. Relevant Legal Standards

### 1. Article XI:1 of the GATT 1994

139. The United States recalls the text of Article XI:1 of the GATT 1994, which states:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member.

140. Under the customary rules of interpretation of public international law, as referenced in Article 3.2 of the DSU, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>254</sup> The ordinary meaning of the term “prohibitions” in Article XI:1, in its context, is a “legal ban on the trade or importation of a specified commodity,” as the Appellate Body has previously noted.<sup>255</sup> Article XI:1 by its express terms sets out that a Member shall not institute or maintain a “prohibition” on “the importation of any product of the territory of any other Member.” Thus, as previous panels have confirmed, Article XI:1 establishes that Members “shall not forbid the importation of any product of any other Member into their markets.”<sup>256</sup>

141. The ordinary meaning of the term “restriction,” in the context of Article XI:1, can capture a number of forms of measures. The pertinent definition of “restriction” in relation to the acts of importation or exportation is “a limitation on action, a limiting condition or regulation.” The panel in *India – Quantitative Restrictions* thus found that “[t]he scope of the term ‘restriction’ is . . . broad, as seen in its ordinary meaning.”<sup>257</sup> The panel in *India – Autos* reached the same conclusion, finding that “any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1.”<sup>258</sup> The Appellate

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<sup>254</sup> *US – Gasoline (AB)*, pp. 16-17 (quoting Article 31 of the Vienna Convention on the Law of Treaties and stating: “That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other ‘covered agreements’”).

<sup>255</sup> *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); *Argentina – Import Measures (AB)*, para. 5.217 (quoting same).

<sup>256</sup> See *Brazil – Retreaded Tyres (Panel)*, para. 7.11, *Colombia – Ports of Entry*, para. 7.240; *US – Poultry (China)*, para. 7.454.

<sup>257</sup> *India – Quantitative Restrictions (Panel)*, para. 5.128.

<sup>258</sup> *India – Autos (Panel)*, para. 7.265 (original emphasis omitted); see also *Dominican Republic – Cigarettes (Panel)*, para. 7.269 (citing same).

Body endorsed this approach in *China – Raw Materials* and *Argentina – Import Measures*, finding that “restriction” refers to “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation” and thus “refers generally to something that has a limiting effect.”<sup>259</sup>

142. Further, Article XI:1 applies to *any* “restriction,” including those “made effective through quotas, import or export licenses *or other measures*.”<sup>260</sup> As stated in that article, only measures that take the form of “duties, taxes, or other charges” fall outside the scope of Article XI:1.<sup>261</sup> The *India – Quantitative Restrictions* panel reasoned that:

[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions “other than duties, taxes or other charges”. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies ‘to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.’<sup>262</sup>

Subsequent panels have agreed with this interpretation.<sup>263</sup>

143. A finding that a measure constitutes a restriction within the meaning of Article XI:1 does not require a showing that trade flows have been affected. Article XI:1 proscribes restrictions “on the importation” or “on the exportation” of any product, not restrictions on the *level* of imports or exports. The terms used (“importation” / “exportation”) reach the process of importing or exporting.<sup>264</sup> Similarly, the Appellate Body in *Argentina – Import Measures* recently concluded that the “limiting effect” of a restriction under Article XI:1 “need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can

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<sup>259</sup> See *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); *Argentina – Import Measures (AB)*, para. 5.217 (quoting same).

<sup>260</sup> Emphasis added.

<sup>261</sup> Article XI:2 contains a list of restrictions or prohibitions that are not prohibited under Article XI:1, and measures complying with certain other provisions of the WTO Agreements also may not be found to breach Article XI:1. See *Argentina – Import Measures (AB)*, paras. 5.219-5.221.

<sup>262</sup> *India – Quantitative Restrictions (Panel)*, para. 5.128 (quoting *Japan – Trade in Semi-conductors (GATT Panel Report)* and *The New Shorter Oxford English Dictionary* at 2569 (1993)).

<sup>263</sup> *Argentina – Import Measures (Panel)*, para. 6.251; *India – Autos (Panel)*, para. 7.264; *Colombia – Ports of Entry*, para. 7.233; *Dominican Republic – Cigarettes (Panel)*, para. 7.248.

<sup>264</sup> See *The New Shorter Oxford English Dictionary*, 4<sup>th</sup> edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 1324 (Exh. US-45) (defining “importation” as, “the action of importing or bringing in something”); *The New Shorter Oxford English Dictionary*, 4<sup>th</sup> edn, Lesley Brown et al. (eds.) (Oxford University Press, 1993), Vol. 1, at 889 (Exh. US-46) (defining “exportation” as “the action or practice of exporting”).

be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.”<sup>265</sup>

144. Prior WTO disputes have addressed restrictions or prohibitions *made effective through* import licensing restrictions in particular. The panel in *India – Quantitative Restrictions* considered several aspects of India’s import licensing regime, including (1) the granting of licenses on “unspecified merits,” (2) making only government agencies eligible for licenses to import certain products, and (3) restricting the entities that could obtain import licenses and the purposes for which they could do so.<sup>266</sup> The panel found that all three aspects were inconsistent with Article XI:1 because they operated so that “certain imports may not be permitted,” due to the product or the prospective importer at issue.<sup>267</sup>

145. Most recently, the panel in *Argentina – Import Measures*, considered a measure under which approval by various government agencies was “a necessary condition to import goods into Argentina.”<sup>268</sup> The agencies could, and did, impose a variety of conditions on importers before granting import approvals. The conditions included achieving a trade balance or export surplus and increasing local content by purchasing from domestic producers or developing local manufacture.<sup>269</sup> The panel concluded that the measure was inconsistent with Article XI:1, stating:

[The] procedure has a limiting effect on imports, and thus constitutes an import restriction, because it: (a) restricts market access for imported products to Argentina as obtaining a DJAI in exit status is not automatic; (b) creates uncertainty as to an applicant's ability to import; (c) does not allow companies to import as much as they desire or need without regard to their export performance; and, (d) imposes a significant burden on importers that is unrelated to their normal importing activity.<sup>270</sup>

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<sup>265</sup> *Argentina – Import Measures (AB)*, para. 5.217; *see also Argentina – Import Measures (Panel)*, para. 6.455; *Colombia – Ports of Entry*, para. 7.240 (noting that the findings in prior disputes applying Article XI:1 “were based on the design of the measure and its potential to adversely affect importation, as opposed to a standalone analysis of the actual impact of the measure on trade flows.”); *US – Poultry (China)*, para. 7.454; *Argentina – Hides and Leather*, para. 11.20.

<sup>266</sup> *India – Quantitative Restrictions (Panel)*, paras. 5.125, 5.137, 5.140.

<sup>267</sup> *India – Quantitative Restrictions (Panel)*, paras. 5.129 (finding that the regime “by [its] very nature operate[s] as [a] limitation[] on action since certain imports may not be permitted”), 5.139 (finding that “[l]icences under this regime can be granted only to certain categories of exporters and licences are not always granted”), 5.142 (finding the restriction on who could apply for licenses to be a “restriction” “because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted”).

<sup>268</sup> *Argentina – Import Measures (Panel)*, para. 6.461.

<sup>269</sup> *Argentina – Import Measures (Panel)*, para. 6.255.

<sup>270</sup> *Argentina – Import Measures (Panel)*, para 6.474.

These findings were appealed by Argentina, but the Appellate Body agreed with and upheld the findings by the panel.<sup>271</sup>

## 2. Article 4.2 of the Agreement on Agriculture

146. Article 4.2 of the *Agreement on Agriculture* states:

Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties<sup>1</sup>, except as otherwise provided for in Article 5 and Annex 5.

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<sup>1</sup> The measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.

147. Article 4.2 proscribes certain types of measures by stating that a Member “shall not maintain, resort to or revert to any measures of the kind which have been required to be converted into ordinary customs duties.” The types of measures “include” those listed in footnote 1 to that article. Footnote 1 sets out certain types of measures (e.g., “quantitative import restrictions” and “discretionary import licensing”) and further specifies that “similar border measures other than ordinary customs duties” would also be encompassed by the article. Thus, with respect to the measures identified in footnote 1 to Article 4.2, the Appellate Body has reasoned that if a measure falls within any one of the categories of the measures listed in footnote 1, including measures that are “similar” to those listed,<sup>272</sup> it is among the “measures of the kind which have been required to be converted into ordinary customs duties,” and thus must not be maintained as of the date of entry into force of the WTO Agreement.<sup>273</sup>

148. In past reports involving Article 4.2, the Appellate Body has noted that a key objective of the Agreement on Agriculture is “to establish a fair and market-oriented agricultural trading system,” and that Article 4 is “the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products.”<sup>274</sup> As the Appellate Body recently stated in *Peru – Agricultural Products*

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<sup>271</sup> See *Argentina – Import Measures (AB)*, paras 5.287-5.288.

<sup>272</sup> *Chile – Price Band System (AB)*, para. 239.

<sup>273</sup> *Chile – Price Band System (AB)*, para. 221.

<sup>274</sup> *Peru – Agricultural Products (AB)*, paras. 5.37-38 (quoting *Chile – Price Band System (AB)*, para. 201; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 145).

[T]he [Uruguay Round] negotiators decided that [certain types of] border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection.<sup>275</sup>

149. In this dispute, the United States and New Zealand have challenged Indonesia’s measures under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Similar situations have arisen in previous disputes, in light of the similarity of the obligations in these two provisions. Previous panels have found that, with respect to border measures that impose prohibitions or restrictions inconsistent with Article XI:1 of the GATT 1994 that are also among the measures listed in footnote 1 to Article 4.2 or “other similar border measures”, a breach of Article XI:1 results in a breach of Article 4.2. The panel in *Korea – Various Measures on Beef*, for example, found that restrictions on importation maintained through state trading enterprises fell within the scope of both Article XI:1 and Article 4.2, as one of the measures listed in footnote 1.<sup>276</sup> Consequently, the panel found that,

[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises.<sup>277</sup>

150. Other panels have reached similar conclusions. The panel in *India – Quantitative Restrictions* considered that the “legal status of India’s import restrictions” under Article 4.2 of the Agreement on Agriculture was “identical” to that under the GATT 1994. Applying analogous reasoning, the panel in *EC – Seal Products* rejected Norway’s challenge to the EU seal regime under Article 4.2 of the Agreement on Agriculture entirely on the ground that the panel had already rejected Norway’s challenge under Article XI:1 of the GATT 1994, and Norway had relied on its evidence and arguments adduced under its Article XI:1 claim in its Article 4.2 claim.<sup>278</sup> And the panel in *US – Poultry (China)* exercised judicial economy with respect to China’s Article 4.2 claim on the grounds that its findings under Article XI:1 “effectively resolved the aspects in this dispute related to the ‘restrictions’ on Chinese poultry and poultry products into the United States.”<sup>279</sup>

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<sup>275</sup> *Peru – Agricultural Products (AB)*, para. 5.38 (citing *Chile – Price Band System (AB)*, para. 200).

<sup>276</sup> *Korea – Various Measures on Beef (Panel)*, paras. 751, 759.

<sup>277</sup> *Korea – Various Measures on Beef (Panel)*, para. 762.

<sup>278</sup> *EC – Seal Products (Panel)*, para. 7.665.

<sup>279</sup> *US – Poultry (China) (Panel)*, para. 7.486.

## **B. Indonesia’s Import Licensing Regime for Horticultural Products Is Inconsistent with Indonesia’s Obligations Under Article XI:1 of the GATT 1994**

151. Indonesia’s import licensing regime for horticultural products imposes impermissible “restrictions” and “prohibitions” within the meaning of Article XI:1 of the GATT 1994. As explained in detail above, “restriction,” as used in Article XI:1, refers to “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation,” i.e. “to something that has a limiting effect.”<sup>280</sup> “Prohibition” refers to a “legal ban on the trade or importation of a specified commodity.”<sup>281</sup> Thus, Article XI:1 establishes a “general ban on import or export restrictions or prohibitions” other than duties, taxes, or other charges, including restrictions operated through import licenses.<sup>282</sup>

152. In addition to breaching Article XI:1 based on the limitation, limiting condition on importation or limiting effect on importation of Indonesia’s import licensing regime as a whole, Indonesia’s import licensing regime for horticultural products imposes the following specific restrictions on importation:

- The limited application windows and validity periods for RIPHs and Import Approvals stop the importation of covered horticultural products during certain times;
- Once the import semester begins, the importation of horticultural products is restricted to the type, quantity, country of origin, and port of entry listed on their RIPHs and Import Approvals valid for that period;
- An importer is required to import at least 80 percent of the quantity specified on its Import Approval and failure to do so results in the suspension of an importer’s RI or PI designation;
- Importation of covered horticultural products is restricted or banned based on the domestic harvest seasons for those products;
- The quantity of imported horticultural products is limited based on importers’ ownership of storage capacity;
- Importers are prohibited from importing covered horticultural products other than for certain limited uses and purposes;

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<sup>280</sup> See *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); *Argentina – Import Measures (AB)*, para. 5.217 (quoting same).

<sup>281</sup> *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); *Argentina – Import Measures (AB)*, para. 5.217 (quoting same).

<sup>282</sup> See *India – Quantitative Restrictions (Panel)*, para. 5.128; *India – Autos (Panel)*, para. 7.265; *China – Raw Materials (Panel)*, para. 7.206; *Colombia – Ports of Entry (Panel)*, paras. 7.233-235.

- Importation of chilies and fresh shallots is suspended when their market prices fall below government-set Reference Prices; and
- Importation of horticultural products harvested more than six months previously is prohibited.

153. Based on each of these separate elements, and based on its operation as a whole, Indonesia’s import licensing regime for horticultural products breaches Article XI:1 of the GATT 1994. The United States explains below how each of the eight separate prohibitions or restrictions is inconsistent with Article XI:1 and then explains how Indonesia’s import licensing regime as a whole is inconsistent with that provision.

### **1. The Application Windows and Validity Periods Constitute Restrictions Inconsistent with Article XI:1**

154. The combined operation of the limited time windows within which importers can apply for and receive import permits and the short validity periods within which imports can enter Indonesia results in periods of time during which no imports can be made. This requirement is inconsistent with Article XI:1 of the GATT 1994 because it is a restriction within the meaning of Article XI:1 that is, it is a limitation, or limiting condition on importation, or has a limiting effect on importation.<sup>283</sup>

#### *a. The Application Windows and Validity Periods Are A “Restriction” Within the Meaning of Article XI:1*

155. Indonesia’s application window and validity period requirements are “restrictions” within the meaning of Article XI:1 because the structure of these requirements causes a period of several weeks at the end of one semester and the beginning of another when products from the United States (and other Members far from Indonesia) *cannot* be exported to Indonesia and, therefore, opportunities to import those products into the Indonesian market will be limited.

156. As explained previously, an RI can apply for RIPHs and Import Approvals to import horticultural products only during a limited window prior to the beginning of a new six-month semester.<sup>284</sup> RIPHs and Import Approvals are valid only for one six-month semester, and an RI must reapply for them every semester.<sup>285</sup> Shipping of horticultural products for any semester cannot begin until after RIPHs and Import Approvals are issued because exporters shipping goods to Indonesia must have valid RIPH and Import Approval numbers from the RI in Indonesia in order to have their horticultural products inspected and verified in the country of origin.<sup>286</sup> Once an RI obtains its RIPH and Import Approval and places its orders for the next

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<sup>283</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>284</sup> See *supra* sec. III.A.3.c.

<sup>285</sup> MOT 16/2013, as amended by MOT 47/2013, article 13A (JE-10); MOA 86/2013, article 13 (JE-15).

<sup>286</sup> Ministry of Trade, Import Approval for Horticultural Products, para. 1 (Exh. US-19) (stating: “Imports of the aforementioned Horticultural Products must undergo verification or technical inquiry in the country of origin by...in a manner that is in accordance with customs procedures”). *Id.* at para. 3 (stating that to verify the quantity

semester, assuming the U.S. exporters ship immediately, it still takes at least four to six weeks for horticultural products to arrive in Indonesia.<sup>287</sup> Further, the products must arrive in Indonesia and clear customs before the end of the semester.<sup>288</sup> Because it takes four to six weeks to ship horticultural products from the United States to Indonesia,<sup>289</sup> U.S. exporters must stop their shipments well before the current semester ends to ensure that their products will arrive in Indonesia and can clear customs before the expiration of the RIPHs and Import Approvals that authorized these shipments. Consequently, at the end of each semester, there is a period of five to six weeks when U.S. exporters cannot ship under RIPHs and Import Approvals for the current semester because the goods cannot arrive in time; but exporters cannot start shipping under RIPHs and Import Approvals for the next semester because those import permits have not yet been issued. Because U.S. exports are effectively stopped during this period of time, importation of those products into Indonesia will also come to a stop.<sup>290</sup>

157. These periods of non-shipment created by the structure of the application windows and validity periods of the RIPHs and Import Approvals impose limiting conditions on importation and have direct limiting effects on horticultural products imported into Indonesia. First, this restriction necessarily reduces the total time and opportunity available for an RI to import horticultural products during a year. The lack of shipments means that the RI cannot bring certain imported horticultural products to the Indonesian market for eight to twelve weeks between the two semesters, effectively denying market access to the imported products for those weeks. Second, the restriction creates additional uncertainty and imposes additional costs on the RIs in Indonesia and their exporter partners: they bear the risk of having their horticultural

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and type of the imported goods, the RI must show an original copy of the Import Approval to a Customs and Excise official, on site, for each importing activity); MOT 16/2013, as amended by MOT 47/2013, articles 21 and 22 (JE-10) (“Every shipment of imported horticultural products must undergo preshipment inspection at its port of origin, including verification of country of origin, product type and quantity, shipping timing, and port of destination”).

<sup>287</sup> NHC Statements, at pp. 7-8 (Exh. US-21) (stating: “Even if permits are issued at the beginning of a validity period, it may take several weeks to complete all the paperwork, plus a month for transportation, so that the first fruit doesn’t reach Indonesia until about 6 weeks after the validity period begins. And on the other end, we have to stop selling to Indonesian importers about 6 weeks before the end of the validity period to ensure that the fruit arrives and clears customs by the last day of the period.”).

<sup>288</sup> Ministry of Trade, Import Approval for Horticultural Products, para. 7 (Exh. US-19) (stating: “This Import Approval is valid beginning July 1, 2014 (one July two thousand fourteen) until December 31, 2014 (thirty one December two thousand fourteen), as proven by the date of a customs registration notice, Manifest (BC 1.1), in accordance with valid customs provisions”).

<sup>289</sup> NHC Statements, at pp. 3, 5 (Exh. US-21) (stating that it takes 4 to 6 weeks for products from the United States to reach Indonesia after making the usual, economically determined, stops); “Shipping Times to Jakarta from Various U.S. Ports,” <https://www.searates.com/reference/portdistance/> (accessed Oct. 29, 2015) (Exh. US-49) (showing that, counting only time on the water – not including time needed to transport products to a port, time for any stops en route, or time to clear customs in Indonesia – it takes at least 3 to 5 weeks to ship freight from various ports in the United States to Indonesia).

<sup>290</sup> See Northwest Horticultural Council, “U.S. Washington State Apple Exports to Indonesia, by Week,” Nov. 11, 2015 (Exh. US-50) (showing that, beginning in 2013 and continuing through 2015, shipments of U.S. apples to Indonesia came to a halt towards the end of the first and second semesters, i.e., in December and June).

products re-exported or destroyed if their shipments are delayed and arrive in Indonesia after the expiration of the RIPH and Import Approval.<sup>291</sup>

158. That the structure of the application windows and validity periods of RIPHs and Import Approvals are restrictions under Article XI:1, fits squarely within the findings of past panels and the Appellate Body.<sup>292</sup> For example, the panel in *Colombia – Ports of Entry* considered a measure that restricted the entry of imports of certain textile and apparel products from Panama to two Colombian ports. Evaluating the measure’s impact on “competitive opportunities available to imported products,”<sup>293</sup> the panel found that the challenged measure had a “limiting effect” on imports because “uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”<sup>294</sup> But Indonesia’s requirements go well beyond “uncertainties” and “likely increased costs.” Beyond restricting the port of entry for imports, Indonesia’s measures operate to wholly exclude U.S. horticultural products from the Indonesia market for four to six weeks out of every semester, and two to three months out of every year.

159. The application window and validity period requirements imposed by Indonesia’s regulations are a limitation on importation and have a demonstrable limiting effect on imports. Thus, these requirements constitute a “restriction” within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

**2. Restricting Imports of Horticultural Products During a Semester to Those of the Type, Quantity, Country of Origin, and Port of Entry Listed on the Original Import Documents for That Period Is Inconsistent with Article XI:1**

160. Indonesia limits the permitted imports of horticultural products to products of the type, quantity, country of origin, and port of entry listed on the RIPH and Import Approval granted at the beginning of each semester. The importation of any other horticultural products, or of products from different origins or into different ports, is prohibited without a valid permit. This requirement is a restriction within the meaning of Article XI:1, and therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>295</sup>

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<sup>291</sup> MOT 16/2013, as amended by MOT 47/2013, article 30(2) (JE-10); *see also* NHC Statements (Exh. US-21) (stating: “The second six-month import period of 2014 ended at the end of December. We had to stop shipping in mid-November because we cannot risk putting fruit on the water and having it arrive after December 31. (If that happened, the container would be diverted elsewhere and not allowed to unload.)”).

<sup>292</sup> *See Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>293</sup> *Colombia – Ports of Entry*, para. 7.236 (citing *Argentina – Hides and Leather*, para. 11.20; *EEC – Oilseeds I* (GATT 1947 Panel), para. 150; *Japan – Leather II (US)* (GATT 1947 Panel Report), para. 55).

<sup>294</sup> *Colombia – Ports of Entry*, para. 7.274.

<sup>295</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

a. *Indonesia’s Requirement Is A “Restriction” Within the Meaning of Article XI:1*

161. A measure is a “restriction” if it imposes “a limitation on importation, a limiting condition on importation, or has a limiting effect on importation.”<sup>296</sup> Where, as here, only certain imports, as listed on the RIPH and Import Approval at the outset of each semester, are allowed to enter the territory of a Member during that semester, that measure imposes a restriction on imports within the meaning of Article XI:1.

162. As explained in Section III.A.3.c, during any six-month semester, the only horticultural products that are permitted to be imported are those that conform to the products listed on importers’ original RIPHs and Import Approvals, as issued at the beginning of the semester.<sup>297</sup>

163. For PIs, this means that they can only import the specific type of horticultural products from the country of origin through the port of entry specified on their RIPHs during the six month semester.<sup>298</sup> Because RIs must obtain Import Approvals as well as the RIPHs, in addition to type, country of origin, and port of entry limitations, RIs cannot import horticultural products beyond the quantities specified on their Import Approvals. Once Indonesia issues the RIPHs and Import Approvals for a six month semester, importers cannot change the listed specifications or apply to import new or additional products.<sup>299</sup> Thus, importers cannot take advantage of market opportunities or mitigate risks inherent in the global supply chain. Specifically, once the semester begins, importers cannot make changes based on market or other circumstances that may be necessary to meet current demand; whether that is because certain products are no longer needed, or because additional or new products are needed due to the unavailability or insufficiency of the original orders, or even due to changed circumstances regarding the condition of the importer itself.

164. Therefore, (1) imports of certain products (those for which no RIPH or Import Approval was granted at the beginning of the import period) are effectively banned until the next period; (2) only a specified quantity of each type of product can be imported until the next period; (3) products from other WTO Members are restricted to the amounts originally requested by importers (so effectively may be set at zero for the period); and, (4) if the original port of entry is no longer available or commercially feasible for use, the products cannot enter through a

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<sup>296</sup> See discussion *supra* Section III.A.1. *Argentina – Import Measures (AB)*, para. 5.217 (quoting *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, at 2363).

<sup>297</sup> MOT 16/2013 as amended by MOT 47/2013, article 30(2)-(4) (JE-10) (stating that imports that are not the horticultural product in the PI designation or in the Import Approvals will be destroyed or re-exported with the cost being borne by the importer).

<sup>298</sup> MOA 86/2013, article 13(3) (JE-15) (RIPHs are issued two times a year during two 15 day windows in November and May.).

<sup>299</sup> MOA 86/2013, article 13 (JE-15) (stating RIPHs are issued two times a year during two 15-day windows in November and May.); MOT 16/2013, as amended by MOT 47/2013, article 13A (JE-10) (stating that the application window for Import Approvals are December and June, which the months before the beginning of the new semesters.)

different port of entry. The type, quantity, country of origin, and port of entry requirements imposed through the RIPHs and Import Approvals therefore is a limitation on importation, a limiting condition on importation, or has a limiting effect on importation, and constitutes a “restriction” within the meaning of Article XI:1.

165. Previous panels have similarly found that measures imposing limits of this kind are restrictions under Article XI:1.<sup>300</sup> For example, in *India – Autos*, the panel considered a measure that imposed a trade balancing requirement that companies’ exports be at least equivalent in value to their imports. The panel found that the measure was a restriction contrary to Article XI:1 because “an importer [was] not free to import as many restricted kits or components as he otherwise might so long as there is a finite limit to the amount of possible exports.”<sup>301</sup> Thus, although the measure “[did] not set an absolute numerical limit on the amount of imports,” imports were restricted in reality because there was a limit to the amount of products that companies would have the “desire and ability to export,” and this would limit the quantity of products that they would be permitted to import.<sup>302</sup>

166. In *Colombia – Ports of Entry*, the panel found that a measure restricting the entry of certain textile and apparel products from Panama to two ports of entry in Colombia was a restriction under Article XI:1. The panel explained: “The uncertainties that arise from the ports of entry measure are substantial since importers’ may only access one seaport and one airport whenever the measure is temporarily imposed.”<sup>303</sup> The panel then found that these “uncertainties . . . and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”<sup>304</sup> The panel also confirmed that other previous panels had found that a measure could effect a restriction based on its impact on the “competitive opportunities available to imported products” and on the transaction costs associated with importation.<sup>305</sup>

167. The type, quantity, country of origin, and port of entry requirement strictly limits the products that can be imported once a validity period has begun, and therefore is a limitation on importation or a limiting condition on importation, or has a limiting effect on importation. For these reasons, this requirement operates as a “restriction” prohibited by Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

### 3. The Realization Requirement Is Inconsistent with Article XI:1

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<sup>300</sup> See *India – Autos (Panel)*, para. 7.268; *Colombia – Ports of Entry*, paras. 7.274, 7.236-239; *Argentina – Hides and Leather (Panel)*, para. 11.20; *EEC – Oilseeds I (GATT 1947 Panel)*, para. 150; *Japan – Leather II (US) (GATT 1947 Panel Report)*, para. 55.

<sup>301</sup> *India – Autos (Panel)*, para. 7.320.

<sup>302</sup> *India – Autos (Panel)*, para. 7.268.

<sup>303</sup> *Colombia – Ports of Entry*, para. 7.274.

<sup>304</sup> *Colombia – Ports of Entry*, para. 7.274.

<sup>305</sup> *Colombia – Ports of Entry*, paras. 7.236, 7.238-239.

168. Indonesia requires an RI to import (“realize”) at least 80 percent of the quantity specified for each type of horticultural product on its Import Approval for the six-month semester. This requirement is a restriction within the meaning of Article XI:1, and therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>306</sup>

*a. The Realization Requirement Is A “Restriction” Within the Meaning of Article XI:1*

169. Indonesia’s 80 percent import realization requirement is a “restriction” under Article XI:1 of the GATT 1994 because it is a condition on importation that leads importers to reduce the quantity of products that they request permission to import and may render the importer ineligible to import products if the condition is not met. The requirement is thus a limitation or limiting condition on importation or has a “limiting effect” on imports.<sup>307</sup>

170. As discussed in III.A.3.d, for each semester, Indonesia requires each RI to import (or realize) at least 80 percent of the quantity specified for each type of horticultural products listed on its Import Approval.<sup>308</sup> To monitor compliance, Indonesia requires each RI to submit monthly its Import Realization Control Card, which accounts for the quantity of their realized imports.<sup>309</sup> An RI that fails to meet the 80 percent realization requirement or fails to file the Import Realization Control Card may have its RI designation suspended.<sup>310</sup> An RI that fails to file the Import Realization Control Card three times could have its designation revoked for two years.<sup>311</sup>

171. This 80 percent import realization requirement leads RIs to lower the quantities they request in their Import Approval applications.<sup>312</sup> Because an RI will lose its importer designation if it fails to meet the 80 percent realization figure by the end of the six-month semester, an RI must select an import amount for its application for Import Approval that would likely avoid a situation in which it must continue importing products, even for no gain or at a loss, to reach the 80 percent figure. Specifically, the RIs are concerned that

[I]f the market is over-supplied at the end of an import period (because, for example, of a number of importers all trying to meet 80% of their quota) that will

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<sup>306</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>307</sup> *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>308</sup> MOT 16/2013, as amended by MOT 47/2013, article 14A (JE-10).

<sup>309</sup> MOT 16/2013, as amended by MOT 47/2013, article 14 and Appendix II (JE-10).

<sup>310</sup> According to a 2015 revision to MOT 16/2013, as amended by MOT 47/2013, the RI designation could be suspend for one year (two semesters). *See* MOT 40/2015 (JE-11).

<sup>311</sup> MOT 16/2013, as amended by MOT 47/2013, articles 26A and 27A (JE-10).

<sup>312</sup> MOT 16/2013, as amended by MOT 47/2013, article 14A (JE-10).

drive prices down, and importers will end up losing money because they will have to sell the [products] for less than they paid for it.<sup>313</sup>

172. Indeed, for the importation of chilies and shallots, the Reference Price requirement (described below) makes importing large quantities during short periods of time to comply with the realization requirement even riskier, as it could cause the prices of chilies and shallots to drop below the Reference Prices and cut off imports altogether.

173. Thus, to mitigate this risk created by the 80 percent realization requirement, each RI must lower the quantity it requests in its Import Approval application to less than the amount it would request otherwise.

174. RIs have confirmed that the 80 percent import realization requirement imposes limiting conditions on the importation of horticultural products by creating the incentive to ask for a lower quantity. According to Indonesia’s horticultural export and import association, “importers are therefore conservative in the amounts they apply to import to make sure they will be able to meet the 80% rule and so avoid sanctions.”<sup>314</sup>

175. The realization requirement imposed through the RIPHs and Import Approvals is a limitation or limiting condition on importation, or has a limiting effect on importation. The importer is subjected to the requirement as a condition for receiving permission to import, and failure to meet the requirement may result in ineligibility to import in a future period. Further, the realization requirement creates a powerful inducement to importers to lower the amounts for which they seek permission to import, imposing a limitation on importation and having a limiting effect on imports. Thus, the realization requirement constitutes a “restriction” within the meaning of Article XI:1.

176. Previous panels have similarly found that measures imposing limits of this kind are restrictions under Article XI.<sup>315</sup> For example, the panel in *India – Autos* found that a measure with a similar limiting effect was a “restriction” under Article XI:1. One of the measures that the panel considered was India’s requirement that importers balance the value of imported auto kits and components with the value of their exports from India.<sup>316</sup> The panel found that this requirement did not set an “absolute numerical limit,” but “induced [an importer] . . . to limit its imports of the relevant products” in relation to the importers’ “concern[] about its ability to export profitably.”<sup>317</sup> The panel found that this amounted to an import restriction because “a manufacturer is in no instance free to import, without commercial constraint, as many kits and

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<sup>313</sup> See NHC Statement, at 3 (Exh. US-21).

<sup>314</sup> See Letter from the Exporter-Importer of Fresh Fruit and Vegetable Indonesian Association (ASEIBSSINDO), Oct. 22, 2015 (“ASEIBSSINDO Letter”) (Exh. US-28).

<sup>315</sup> *India – Autos (Panel)*, para. 7.268; see also *Argentina – Import Measures (Panel)*, para. 6.256 (The panel found that Argentina’s trade balancing requirement constitutes a limiting condition because “importers are not free to import as much as they desire or need without regard to their export performance.”)

<sup>316</sup> *India – Autos (Panel)*, para. 7.268.

<sup>317</sup> *India – Autos (Panel)*, para. 7.268.

components as it wishes without regard to its export opportunities and obligations.”<sup>318</sup> Similarly, the 80 percent realization requirement causes importers to limit the amount that they request in their import approval applications, which, in turn, restricts the quantity of products they are allowed to import.

177. The 80 percent realization requirement is a limitation or condition on importation that may render the importer ineligible to import products if the condition is not met and that leads importers to reduce the quantity of products that they request permission to import. For these reasons, this requirement operates as a “restriction” prohibited by Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

#### **4. The Restriction on the Importation of Horticultural Products Based on the Indonesian Harvest Period Is Inconsistent with Article XI:1**

178. Indonesia restricts the importation of horticultural products based on the Indonesian harvest periods for the same domestic products. This limitation to certain periods is a restriction on importation and, therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>319</sup>

##### *a. The Harvest Period Requirement is A “Restriction” Within the Meaning of Article XI:1*

179. The harvest period requirement is a limitation, or limiting condition on importation, or has a limiting effect on importation. Through the RIPH process, Indonesia limits the importation of certain horticultural products during the harvest season for the same domestic products. Thus, the harvest season requirement imposes limitations or limiting conditions on importation, or has a limiting effect on importation.

180. As discussed in Section III.A.3.e., under MOA 86/2013, the Ministry of Agriculture establishes periods of time within each six-month semester during which it restricts or prohibits the importation of certain horticultural products to protect the same domestic products during their harvest periods.<sup>320</sup> The Ministry of Agriculture requires an RI to submit its plan as to when and where it intends to distribute the imported horticultural products during each semester.<sup>321</sup> Based this information, the Ministry limits the importation of horticultural products with respect to domestic harvest periods through the RIPH process. For example, in a letter regarding RIPH applications for the second semester of 2015, Ministry of Agriculture officials discussed banning or restricting importation of certain fruits and vegetables based the harvest periods of those

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<sup>318</sup> *India – Autos (Panel)*, para. 7.277.

<sup>319</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>320</sup> MOA 86/2013, article 5. (JE-15).

<sup>321</sup> MOA 86/2013, article 8(2)(e) (JE-15); RI Notification of Distribution Plan to Ministry of Agriculture, May 2015 (Exh. US-24).

products in various regions in Indonesia.<sup>322</sup> Indonesia later adopted these recommendations and imposed the limitations during the second semester of 2015.<sup>323</sup>

181. Because importers must obtain RIPHs to import horticultural products for each six month semester, restrictions through the RIPHs issued for certain fruits, such as mangoes, during Indonesia’s harvest period for that fruit directly limits the types and quantities of imported products entering Indonesia during the entire six-month period. As the Ministry of Agriculture letter shows, MOA 86/2013 allows the Ministry to ban the importation of some products, such as bananas, melons, papaya, and pineapples, for the entire year because they are harvested year round and their annual domestic production was deemed “stable.”<sup>324</sup>

182. Indeed, Indonesia’s import data for the relevant horticultural products points to the real world impact of Indonesia’s restrictions based on harvest periods. For example, Indonesia imported approximately 980,000 kilograms of mangoes in 2011 and 1 million kilograms in 2012.<sup>325</sup> The import quantity fell precipitously after the promulgation of MOA 86/2013, to 119,000 kilograms in 2013 and to 233,466 kilograms in 2014. In addition, there was no importation of mangoes from January to August of 2013 and from June to December of 2014.<sup>326</sup> Import data for other covered horticultural products such as bananas, durians, melons, and pineapples follow a similar pattern: import quantities fell drastically in 2012 or 2013, and there were periods of no imports at all between 2013 and 2015 (bananas: 1,240,869 kilograms in 2012 to 542,111 kilograms in 2014; durians: 4,881,265 kilograms in 2013 to 11,009 kilograms in 2014; melons: 696,456 kilograms in 2012 to 15,833 kilograms in 2014; and pineapples: 9,756 kilograms in 2012 to 0 kilograms in 2014).<sup>327</sup>

183. Furthermore, during the semesters in which the Ministry of Agriculture restricts the RIPHs issued for certain imported products, those imported products would either have no access or only limited access to the Indonesian market. This means that certain imported horticultural products are either significantly restricted, or precluded, from competing with the domestic products during these harvest periods.

184. As explained, the harvest period requirement is a limitation or limiting condition on importation, or has a limiting effect on importation. The panel in *Turkey – Rice* examined, in the context of Article 4.2 of the Agreement on Agriculture, Turkey’s suspension of issuing import

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<sup>322</sup> See May 6 Letter (Exh. US-25).

<sup>323</sup> See John Hey, “Indonesia’s citrus imports under threat,” *Asiafruit* (Exh. US-26); “Growers Left To Find a Market as Indonesia Turns away Citrus,” *NewsMail* (Exh. US-27).

<sup>324</sup> See May 6 Letter (Exh. US-25).

<sup>325</sup> See “Query: Importation of Mangoes, from 2011-2015, Monthly,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-51).

<sup>326</sup> See “Query: Importation of Mangoes, from 2011-2015, Monthly,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-51).

<sup>327</sup> See “Query: Import data for bananas, durians, melons, and pineapples, from 2011-2015,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-52).

permits during local harvest periods to ensure the absorption of local rice production.<sup>328</sup> It found that such measure “restricted the importation of rice for periods of time” and was thus a quantitative import restriction.<sup>329</sup> Similarly, Indonesia’s requirement based on the Indonesian harvest periods imposes a limitation on imported horticultural products, and has a limiting effect on the quantity allowed into Indonesia.

185. Thus, the harvest period requirement is a restriction within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

## **5. The Restriction on the Importation of Horticultural Products Based on Storage Capacity Is Inconsistent with Article XI:1**

186. Indonesia’s requirement that an importer must own its storage facility and that the quantity specified in the Import Approval cannot exceed the capacity of its storage facility is a restriction within the meaning of Article XI:1 of the GATT 1994 and, therefore, is inconsistent with Article XI:1.<sup>330</sup>

### *a. The Limitation Based on Storage Facility Ownership and Capacity Is A “Restriction” Within the Meaning of Article XI:1*

187. Indonesia requires each importer to own its storage facilities with sufficient capacity to store all of its imported products in order to receive an RI designation and an RIPH to import fresh horticultural products.

188. That is, Indonesia limits the total quantity specified on an importer’s Import Approval for each six-month semester to the total storage capacity of the facilities owned by the RI. Such a requirement limits the quantity of imported products allowed for RIs and increases the cost of importation. This limitation on the quantity of Import Approvals to the quantity of storage facilities owned by the importer imposes a limitation or condition on importation, or has a limiting effect on importation. It, therefore, is a “restriction” within the meaning of Article XI:1 of the GATT 1994.

189. As described above, limiting the quantity of imported products for an entire semester to the storage capacity of each importer necessarily limits the quantity of imported products because it operates as an artificial ceiling on the quantity an RI can import during each semester. Fresh fruits and vegetables inventory can undergo multiple turnovers during a six month semester.<sup>331</sup> But, for example, an RI that owns 10 tons of storage capacity will only receive Import Approvals for 10 tons of imported horticultural product for the semester, even if it could import and sell multiples of that quantity over the semester. Without such a restriction, the importer might be able to fill that 10-ton facility multiple times during a semester. And without

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<sup>328</sup> *Turkey – Rice*, para 7.113.

<sup>329</sup> *Turkey – Rice*, para 7.121.

<sup>330</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>331</sup> ASEIBSSINDO Letter (Exh. US-28).

the ownership requirement, the importer might be able to fill many such facilities multiple times over each semester. Even if the RI manages to purchase additional storage facilities or expand the capacity of its existing facilities, it still has to wait until the next semester to increase the quantity specified in its Import Approval.

190. The ownership requirement also adversely affects the competitive opportunities of imported products by creating burdensome and even prohibitive storage costs. This requirement precludes RIs importing horticultural products from seeking alternative, more economical storage arrangements, including leasing or renting capacity. The requirement to own the storage facility also creates a higher capital barrier to entry for importers seeking RI designation, thereby reducing the pool of customers for shippers and exporters.

191. Thus, the limitation on an importer's Import Approval quantities based on ownership and capacity of an importer's storage facilities imposes a limitation or condition on importation, or has a limiting effect on importation. The ownership and capacity limitation is therefore a restriction within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

## **6. The Restriction on the Importation of Horticultural Products Other Than for Certain Limited Purposes Is Inconsistent with Article XI:1**

192. Indonesia restricts the importation of horticultural products based on their use, sale, and transfer. That is, a condition for importation is the limitation to certain uses, sales, or transfers. These requirements are restrictions within the meaning of Article XI:1 and, therefore, are inconsistent with Article XI:1.<sup>332</sup>

### *a. The Limitations on Use, Sale, and Transfer Are "Restrictions" Within the Meaning of Article XI:1*

193. Indonesia restricts the use, sale, and transfer of imported horticultural products based on an importer's RI or PI designation. An RI can only sell imported horticultural products to distributors and is prohibited from selling directly to consumers and retailers. A PI can only import horticultural products as materials for use in its own industrial production process. A PI is prohibited from selling or transferring imported horticultural products to another entity.<sup>333</sup> The Ministry of Trade may revoke an importer's RI or PI designation for violating these restrictions, which would make the importer ineligible to import horticultural products.<sup>334</sup> These restrictions on importers and their sale, transfer or use of the products they import are a limitation or limiting condition on importation, or have a limiting effect on importation. The importer may not import and sell according to commercial considerations, but only as permitted by its importer status. Failure to respect these limitations would result in a revocation of the importer's ability to import

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<sup>332</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>333</sup> MOT 16/2013, as amended by MOT 47/2013, article 7 (JE-10).

<sup>334</sup> MOT 16/2013, as amended by MOT 47/2013, article 26 (JE-10).

altogether. Thus, the limited use requirement constitutes a “restriction” within the meaning of Article XI:1.

194. Indonesia’s restrictions impose direct limitations and limiting conditions on importers and their use of imported horticultural products, and therefore increase the costs associated with importation. The restriction on RIs means that retailers, such as supermarkets or vegetable and fruit vendors, cannot import horticultural products themselves and cannot buy directly from RIs. Rather, the requirement necessarily inserts another level in the supply chain between RIs and retailers by forcing importers and retailers to rely on distributors in their business models. This restriction lengthens the supply chain and increases the costs associated with imported horticultural products.<sup>335</sup>

195. For PIs, the restriction on importers and their sale and transfer of imported horticultural products creates waste and increases unnecessarily the cost of using imported products in their production processes. If a PI does not use all of its imported horticultural products during its production process, the restriction on sale and transfer forces it to either destroy the excess products or incur the cost of storing them. PIs are thus required to predict precisely the quantity of imported horticultural products that they will use in their production process for each period: if they request too little, they cannot import more and their production will be impaired, but if they import too much, they cannot get rid of it in a cost-effective way but must store or destroy it themselves.

196. Previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. For example, the panel in *India – Quantitative Restrictions* considered an import regime that also included a use restriction. India’s restriction in that dispute required that goods could be imported only by the “actual user,” i.e. the person who utilized the goods for manufacturing in his own unit or for his own use in a commercial establishment, laboratory, or service industry.<sup>336</sup> The panel found the actual user requirement to be “a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.”<sup>337</sup> Indonesia’s use, sale, and transfer restrictions operate in a similar manner, in that they preclude the importation of horticultural products for sale directly to retailers and consumers and, in the case of PIs, for transfer or sale to another entity.

197. Through its use, sales, and transfer requirements, Indonesia precludes an importer from importing and selling, transferring, or using the imported product according to commercial considerations, because the products may be used only as permitted for its importer status. If the importer fails to respect these limitations, Indonesia may revoke the importer’s ability to import altogether. Thus, these restrictions on importers and their sale, transfer or use of the products they import are a limitation or limiting condition on importation, or have a limiting effect on

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<sup>335</sup> See Stephen V. Marks, *Indonesia Horticultural Imports and Policy Responses: An Assessment*, September 2012, USAID/SEADI, at 26 (Exh. US-53).

<sup>336</sup> *India – Quantitative Restrictions (Panel)*, para. 2.24.

<sup>337</sup> *India – Quantitative Restrictions (Panel)*, para. 5.142.

importation. The limited use, sale, and transfer requirement constitutes a “restriction” within the meaning of Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

## 7. The Reference Price Requirement Is Inconsistent with Article XI:1

198. Indonesia stops the importation of chilies and fresh shallots if their domestic market prices fall below the “Reference Prices” determined by the Ministry of Trade and permits importation only if the price is above the “Reference Price.” This requirement is a prohibition or restriction within the meaning of Article XI:1 and, therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>338</sup>

### a. *The Reference Price Requirement Is A “Restriction” Within the Meaning of Article XI:1*

199. Indonesia’s Reference Price requirement for chilies and fresh shallots is a restriction under Article XI:1 because it limits importation of these products to periods when market prices remain above a government-determined level and is a prohibition for those periods when market prices fall below those levels. MOT 16/2013, as amended by MOT 47/2013, stipulates that the importation of chilies and fresh shallots must “observe” the Reference Prices established by the Ministry of Trade.<sup>339</sup> If the market prices of chilies or fresh shallots fall below their respective Reference Prices, the regulation requires that their importation be “postponed until the market price again reaches the Reference Price.”<sup>340</sup>

200. Importation is therefore limited to periods when Indonesia determines market prices are above the Reference Price and prohibited in periods when market prices are below the Reference Price. This Reference Price requirement is thus a limitation or limiting condition on importation, or has a limiting effect on importation. Accordingly, the Reference Price requirement constitutes a “restriction” within the meaning of Article XI:1.

201. Indonesia’s Reference Price requirement is similar to a minimum import price requirement, which previous panels have found to be restriction under Article XI:1. As the panel in *China – Raw Materials* recognized, the “applicability of Article XI:1 to minimum price requirements” was addressed by two GATT panels, *EEC – Minimum Import Prices* and *Japan – Semi-Conductors*, both of which concluded that such requirements were “restrictions” under Article XI:1.<sup>341</sup>

202. The Reference Price requirement is even more categorical than the minimum import prices or minimum export prices found to be restrictions by those previous panels because it

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<sup>338</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>339</sup> MOT 16/2013, as amended by MOT 47/2013, article 14B (JE-10).

<sup>340</sup> MOT 16/2013, as amended by MOT 47/2013, article 14B (JE-10).

<sup>341</sup> See *China – Raw Materials (Panel)*, para. 7.1075 (citing *Japan – Semi-Conductors* (GATT 1947 Panel) paras. 106, 117; *EEC – Minimum Import Prices* (GATT 1947 Panel), para. 4.9).

prohibits *any* imports of chilies and shallots once the Reference Price has been reached, not only imports sold at prices below that Reference Price. Simply put, chilies and shallots that otherwise would have been imported would be excluded whenever *Indonesia* determines that the “market price” is below the Reference Price.

203. Because the Reference Price requirement restricts importation of chilies and fresh shallots to those periods when the market price is above a certain government determined Reference Price, and prohibits importation during periods when the market price is below the Reference Price, the Reference Price requirement is limitation or limiting condition on importation, or has limiting effects, and during certain periods is a prohibition, within the meaning of Article XI:1. Accordingly, *Indonesia* breaches Article XI:1 by instituting or maintaining this requirement.

**8. The Restriction on the Importation of Horticultural Products Harvested More than Six Months Previously Is Inconsistent with Article XI:1**

204. *Indonesia* requires that all imported fresh horticultural products must have been harvested less than six month prior to importation. This requirement is a restriction within the meaning of Article XI:1 and, therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>342</sup>

*a. The Restriction on Products Harvested More than Six Months Previously is a “Restriction” Within the Meaning of Article XI:1*

205. To obtain an RIPH, MOA 86/2013 requires an RI to affirm that it will not import any fresh horticultural products that were harvested more than six months previously.<sup>343</sup> This requirement is categorical and indiscriminate, as it prohibits all fresh horticultural products not meeting the requirement regardless of type of product or its storage characteristics and regardless of whether the importer considers it commercially viable to import such horticultural products. Moreover, *Indonesia* requires an RI to submit as part of its RIPH application a statement committing to follow the requirement, and if the RI violates this requirement, it will not be granted an RIPH or permitted to import horticultural products for one year.

206. The requirement that importers not import products that have been harvested more than six months previously is a limitation or limiting condition on importation, or has a limiting effect on importation. The importer may not import products according to commercial considerations, but only those products meeting the requirement. Failure to satisfy the requirement may further lead to the importer losing the right to import horticultural products for one year.<sup>344</sup> Thus, the six months harvest requirement constitutes a “restriction” within the meaning of Article XI:1.

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<sup>342</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>343</sup> MOA 86/2013, article 8 (JE-15).

<sup>344</sup> MOA 86/2013, article 14 (JE-15).

207. The six months harvest requirement has a pronounced impact on those fresh horticultural products that can be stored for more than six months. Certain horticultural products, such as apples, are stored in controlled atmosphere conditions after harvest, where they remain fresh for more than six months; consequently, apples and certain other horticultural products can be shipped year-round to global markets.<sup>345</sup> Under the six-month harvest requirement, however, RIs are effectively prohibited from importing apples from the United States into Indonesia from April to October (October being the most common month of harvest in North America).

208. The panel in *Turkey – Rice* found, in the context of Article 4.2 of the Agreement on Agriculture, that limiting the issuance of import permits based on specified harvest periods restricted importation and is a quantitative import restriction.<sup>346</sup> Similarly, Indonesia’s requirement imposes a limitation based on the time certain imported horticultural products were harvested, and has a limiting effect on the quantity allowed into Indonesia.

209. The restriction on importing horticultural products harvested more than six months prior to importation is a limitation or limiting condition on importation, or has a limiting effect on importation. The six-month harvest requirement is thus a “restriction” within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining this requirement.

**9. Indonesia’s Import Licensing Regime for Horticultural Products, As a Whole, Is Inconsistent with Article XI:1**

210. Indonesia imposes numerous restrictions and prohibitions on importation of horticultural products through its import licensing regime. As set out above, the United States considers that the requirements that form part of that regime, when considered individually, are each inconsistent with Article XI:1 of the GATT 1994. When Indonesia’s import licensing regime for horticultural products is also considered as a whole, including these overlapping and inter-dependent requirements, the regime constitutes a restriction inconsistent with Article XI:1.<sup>347</sup>

*a. Indonesia’s Import Licensing Regime Imposes “Prohibitions or Restrictions” Within the Meaning of Article XI:1*

211. Indonesia’s import licensing regime, as maintained through MOT 16/2013, as amended by MOT 47/2013, and MOA 86/2013, imposes numerous limitations and limiting conditions on importation and has a wide range of limiting effects on the importation of horticultural products. By imposing numerous requirements an importer must satisfy as conditions for the approval to import and on the act of importation, the import licensing regime is, by its design and structure, an instrument for Indonesia to control and limit the importation of horticultural products. These requirements restrict and limit the importation of horticultural products in the following manner.

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<sup>345</sup> Controlled Atmospheric Storage, Washington Apple Commission, (Exh. US-34).

<sup>346</sup> *Turkey – Rice*, para 7.121.

<sup>347</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

212. Through the regime’s requirements for importation, Indonesia limits imports to products of the type, quantity, country of origin, and point of entry specified on importers’ RIPHs and Import Approvals, which cannot be amended or supplemented during the six-month semester.<sup>348</sup> Thus, once a semester starts, there are quantitative limits imposed on imported products for the duration of that period. In addition to these express quantitative limitations, the application windows and the validity periods for RIPHs and Import Approvals create time periods at the end of each semester when exporters cannot ship any imported products to Indonesia.<sup>349</sup> This restriction necessarily limits and reduces the commercial opportunities available for RIs to import horticultural products during a year, effectively denying market access to those products for several weeks during each semester. Similarly, Indonesia’s restriction on the importation of fresh horticultural products harvested more than six months prior to importation limits importation by RIs of products that can be kept fresh for more than six months under proper storage.<sup>350</sup> This requirement effectively bans the importation of apples from the United States, for example, from April to October every year.

213. Indonesia’s import regime imposes requirements that induce importers to limit the quantity of imports they request permission to import in the first place. When RIs submit their Import Approval applications, for example, difficulty in complying with the 80 percent import realization requirement compels RIs to request a lower quantity in their Import Approval applications than what they otherwise might have requested if this restriction were not in place.<sup>351</sup> Indonesia’s regime also simply imposes limits on the import amounts that may be requested through the conditions Indonesia imposes based on an importer’s ownership of storage capacity.<sup>352</sup> Indonesia’s regime further limits importation by conditioning the importer’s ability to import on satisfying restrictions on the use, sale, and transfer of the imported horticultural products.<sup>353</sup> By limiting commercial opportunities, imposing conditions and requirements, and raising costs to import, Indonesia’s regime restricts the importation of horticultural products.

214. Indonesia also limits the importation of horticultural products by limiting the quantity specified on an RI’s Import Approval. Even if an importer can coordinate its shipments appropriately and comply with the various restrictions above, Indonesia may further limit or even prohibit importation based on the domestic harvest periods for certain fruits and vegetables.<sup>354</sup> This effectively removes opportunities for imported horticultural products to compete with domestic products during harvest periods. For imports of chilies and shallots, Indonesia’s

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<sup>348</sup> See *supra* sec. VI.B.2.

<sup>349</sup> See *supra* sec. VI.B.1.

<sup>350</sup> See *supra* sec. VI.B.8.

<sup>351</sup> See *supra* sec. VI.B.3.

<sup>352</sup> See *supra* sec. VI.B.5.

<sup>353</sup> See *supra* sec. VI.B.6.

<sup>354</sup> See *supra* sec. VI.B.4.

Reference Price requirement halts the importation of chilies and fresh shallots altogether if their respective market prices fall below a government-determined level.<sup>355</sup>

215. These various requirements, when operating in combination, have the effect of both directly limiting imports and creating disincentives for importers to import the type and amount of horticultural products they otherwise would if acting according to their commercial considerations. The design and structure of these requirements ultimately aims to achieve the policy goals set forth in the statutory framework: to “provide protection for national horticultural farmers, business players, and consumers”<sup>356</sup> and to prohibit importation “when the availability of domestic Agricultural Commodities is sufficient.”<sup>357</sup>

216. For all of these reasons, Indonesia’s import licensing regime for horticultural products serves as a limitation or limiting condition on importation, or has a limiting effect on importation. An importer must comply with all aspects of the regime to import, and importation is not undertaken according to commercial considerations but in relation to the requirements and conditions imposed by the regime that distort or frustrate those commercial considerations. The Indonesian regime is, therefore, a “restriction” within the meaning of Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining this regime.

### **C. Indonesia’s Import Licensing Regime for Horticultural Products Is Inconsistent with Indonesia’s Obligations Under Article 4.2 of the Agreement on Agriculture**

217. Indonesia’s import licensing regime for horticultural products and its constituent prohibitions or restrictions are “measures of the kind which have been required to be converted into ordinary customs duties” within the meaning of Article 4.2 of the Agreement on Agriculture. Footnote 1 to Article 4.2 provides that such measures include, *inter alia*, “quantitative restrictions,” “minimum import prices,” and “similar border measures” other than ordinary customs duties. As explained in section IV.A.2 above, where a measure of the type listed in footnote 1 constitutes a “prohibition or restriction” (other than duties, taxes or other charges) in breach of Article XI, that measure also would run afoul of the prohibition in Article 4.2.<sup>358</sup> The United States considers that Indonesia’s import licensing regime for horticultural products – as a whole and in its constituent parts – breaches Article 4.2 for the same reasons that it breaches Article XI:1 of the GATT 1994.

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<sup>355</sup> See *supra* sec. VI.B.7.

<sup>356</sup> Horticulture Law, article 3 (JE-1).

<sup>357</sup> Farmers Law, article 30 (JE-3).

<sup>358</sup> See *India – Quantitative Restrictions (Panel)*, paras. 5.238-242; *Korea – Beef (Panel)*, para. 768 (“Since the panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV, and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of the *Agreement on Agriculture* and its footnote referring to non-tariff measures maintained through state-trading enterprises”); see also *EC – Seal Products (Panel)*, para. 7.665 (rejecting Norway’s challenge to the EU seal regime under Article 4.2 on the ground that the panel had already rejected essentially the same challenge under Article XI:1 of the GATT 1994).

218. The Agreement on Agriculture applies to agricultural products listed in Annex 1 to that agreement, which includes all products in HS Chapters 1 through 24, excluding fish and fish products. The thirty-nine covered horticultural products fall in HS Chapters 7, 8, 20, and 21, and are, thus, covered by the Agreement on Agriculture.

219. In this dispute, the United States has demonstrated that the import licensing regime imposes eight distinct prohibitions and restrictions on importation of horticultural products that are inconsistent with Article XI:1 of the GATT 1994 and that the regime as a whole is inconsistent with Article XI:1. Therefore, the prohibitions and restrictions imposed by Indonesia's import licensing regime, and the regime as a whole, also are inconsistent with Article 4.2 of the Agreement on Agriculture. Specifically, the "prohibitions" and "restrictions" imposed by Indonesia's licensing regime also constitute "quantitative import restrictions" or "similar border measures", or in the case of reference prices, "minimum import prices" or "similar border measures," within the meaning of footnote 1 to Article 4.2.

**1. The Application Windows and Validity Periods Constitute a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

220. As demonstrated in Section IV.B.1 above, Indonesia's application window and validity period requirements are a "restriction" inconsistent with Article XI:1 of the GATT 1994.<sup>359</sup> For similar reasons, this requirement is also inconsistent with Article 4.2 of the Agreement on Agriculture because it is a "quantitative import restriction" or "similar border measure."

221. The term "quantitative import restriction" in Article 4.2 may encompass a number of restrictions which could operate in relation to or through quantities, or have the capacity to affect quantities of imports. Useful context suggesting the encompassing scope of the term may be found in GATT 1994 Article XIII, which in addressing "non-discriminatory administration of quantitative restrictions," includes within such "import restrictions" measures such as quotas (XIII:2(a), 3(b)), import licenses (XIII:2(b), 3(a)), permits without a quota (XIII:2(b)), and tariff quotas (XIII:5). Similarly, the obligations of Article XI, which is addressed to the "general elimination of quantitative restrictions", encompass "prohibitions or restrictions other than duties, taxes or other charges", suggesting that duties, taxes, or other charges could otherwise constitute "restrictions" for purposes of the article. Therefore, just as Article 4.2 requires certain measures to be converted into ordinary customs duties, Article XI:1 reflects a preference by Members for restrictions to be imposed through duties, taxes or other charges rather than through "quotas, import or export licences or other measures."

222. As described above, Indonesia requires all imported horticultural products to arrive in Indonesia and clear customs within the validity periods of the import documents, and re-exports any products that fail to meet this deadline. This requirement means that horticultural product exporters from countries like the United States must stop shipping products to Indonesia four to six weeks before the end of every semester to ensure that their products can clear customs in time. Moreover, exporters cannot begin shipping their products for the next semester until

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<sup>359</sup> See *supra* sec. VI.B.1.

Indonesia has issued Import Approvals for that semester, because a Customs and Excise official on site must have an original copy of the Import Approval to verify that the quantity and type of imported goods matches that covered by the permit. Because Import Approvals are not issued until the beginning of the semester, imported horticultural products also may not arrive in Indonesia until several weeks into each semester.

223. By creating periods of time when importation will not occur, the application window and import approval validity requirements effectively limit the quantity permitted to be imported during those periods to zero and restrict the level of imports that do occur. The panel in *Turkey – Rice* considered a measure in which Turkey failed to grant licenses for imports of rice outside of Turkey’s tariff rate quota (“TRQ”) during certain “periods of time”, effectively blocking such imports during those times.<sup>360</sup> The panel found that the restriction on imports was a measure “of the kind which have been required to be converted into ordinary customs duties under Article 4.2 of the Agriculture Agreement” on the grounds that, even without “any systematic intention to restrict the importation of rice at a certain level,” the measure was “liable to restrict the volume of imports.”<sup>361</sup>

224. Similarly, Indonesia’s application window and validity period requirements limit the periods of time in which importation can occur, because shipments under those permits cannot begin until the Import Approval has been issued, and must clear customs before the period concludes, while the importer may not obtain permits for the subsequent time period until a limited window prior to that subsequent period.. The combined effect of these requirements precludes uninterrupted imports from markets beyond a certain distance and means that U.S. horticultural products are precluded from importation into the Indonesia market for four to six weeks out of every semester, and approximately two to three months out of every year. Thus, the requirements effectively limit the quantity permitted to be imported during those periods to zero. For these reasons, and as the requirements are restrictions inconsistent with Article XI:1 of the GATT 1994, Indonesia’s application window and validity period requirements also constitute quantitative import restrictions or similar border measures in breach of Article 4.2 of the Agreement on Agriculture.

**2. Restricting Imports of Horticultural Products During a Semester to Those of the Type, Quantity, Country of Origin and Port of Entry Listed on the Original Import Documents for That Period Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

225. As discussed in Section VI.B.2, Indonesia limits the importation of covered horticultural products to products of the type, quantity, country of origin, and port of entry specified on the RIPHS and Import Approvals issued for each six-month semester, which constitutes a “restriction” in breach of Article XI:1 of the GATT 1994.<sup>362</sup> For the same reasons, the type,

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<sup>360</sup> *Turkey – Rice*, para. 7.118.

<sup>361</sup> *Turkey – Rice*, paras. 7.121-122.

<sup>362</sup> *See supra* sec. VI.B.2.

quantity, country of origin, and port of entry requirements impose a “quantitative import restriction” or “similar border measure” inconsistent with Article 4.2 of the Agreement on Agriculture.

226. Once an importer has received the relevant permits for a semester, an importer cannot apply for an additional RIPH or an Import Approval during the semester, or request a change to her import permits to import different or additional products or to change the country of origin or the port of entry for the products specified on these import documents. Therefore, because the terms of the RIPH and Import Approval are locked-in, the importer cannot make any changes to its importation of horticultural products based on shifts in consumer demand, supply availability, logistics, or other market conditions for the semester. An RI, for example, cannot import any covered fruits not specified on its RIPH and Import Approval during the semester if consumer demand for the imported fruits arose during the semester. And even if the fruits were specified on the issued import documents, the RI cannot import more than the quantity specified to take advantage of a surge in demand.

227. As noted, the *Turkey – Rice* panel found that Turkey’s “denial, or failure to grant, licenses to import rice outside of the tariff rate quota” was “a quantitative import restriction, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture” because it had “restricted the importation of rice for periods of time.”<sup>363</sup> For similar reasons, Indonesia’s type, quantity, country of origin, and port of entry requirements are a “quantitative restriction” under Article 4.2. For each six-month semester, importers cannot apply for new import permits or change their outstanding permits to allow them to import a greater quantity of products or any products of a different type, country of origin, or port of entry from those listed on their Recommendation and Import Approval for that period. Thus, the requirements effectively limit the quantity permitted to be imported other than as set out on the Recommendations and Import Approvals to zero.

228. Based on the foregoing, and for the same reasons they breach Article XI:1 of the GATT 1994, Indonesia’s type, quantity, country of origin, and port of entry requirements also constitute quantitative import restrictions or similar border measures in breach of Article 4.2 of the Agreement on Agriculture.

### **3. The Realization Requirement Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

229. The United States demonstrated in Section IV.D.4 above that the realization requirement – the requirement that each importer of horticultural products import at least 80 percent of the products listed on its Import Approval for the preceding year or become ineligible for future import permits – is a restriction inconsistent with GATT Article XI:1.<sup>364</sup> For similar reasons,

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<sup>363</sup> *Turkey – Rice*, paras. 7.51, 7.117 and 7.121.

<sup>364</sup> *See supra* sec. IV.D.4.

this requirement is a “quantitative import restriction” or “similar border measure” within the meaning of Article 4.2 of the Agreement on Agriculture.

230. As described above, Indonesia’s 80 percent realization requirement places a limiting condition on importation and, therefore, has the effect of restricting the quantity of imports. An RI that fails to meet this requirement is sanctioned by having its RI designation suspended, effectively taking away its ability to import any horticultural products. The severity of the consequences leads RIs to request lower quantities of the products on their Import Approval applications than they would have requested based on commercial considerations had the requirement not applied. Given the uncertainties of market conditions over a six month semester, RIs have the additional incentive to reduce their requested quantities because they seek to avoid being forced to import products at a loss for the sake of meeting the requirement (especially towards the end of the semester). Thus, this requirement places a limiting condition on the quantity of horticultural products importers request to import, and thereby restricts the amount actually imported.

231. In *Chile – Price Band System*, the Appellate Body noted that “all of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products.”<sup>365</sup> And in analyzing Turkey’s failure to grant licenses for imports entering outside of Turkey rice TRQ, the panel in *Turkey – Rice* found reasoned that “[e]ven without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and predictability of Turkey’s issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports.”<sup>366</sup>

232. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, the 80 percent realization requirement restricts importation of horticultural products into Indonesia, and thus constitutes a “quantitative import restriction” or “similar border measure” in breach of Article 4.2 of the Agreement on Agriculture.

#### **4. The Restriction on the Importation of Horticultural Products Based on the Indonesian Harvest Period Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

233. In Section IV.B.4, the United States demonstrated that Indonesia limits the importation of certain horticultural products for a specified period of time during each six month semester based on Indonesian harvest periods of the same products. For the same reasons this requirement is a “restriction” inconsistent with Article XI:1 of the GATT 1994, the requirement constitutes a “quantitative import restriction” or “similar border measure” in breach of Article 4.2 of the Agreement on Agriculture.

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<sup>365</sup> *Chile – Price Band System (AB)*, para. 227 (emphasis original).

<sup>366</sup> *Turkey – Rice (Panel)*, para. 7.120.

234. Indonesia requires RIs to submit their plans for when and where they intend to distribute the imported horticultural products during the semester as part of their RIPH application.<sup>367</sup> Using this information, Indonesia withholds or limits the RIPH issued to the RIs to stop or reduce imported horticultural products from entering Indonesia during the same domestic product’s harvest season. This requirement restricts the quantity of horticultural products entering Indonesia during specified periods of time in a semester.

235. As discussed above, the *Turkey – Rice* panel found that Turkey’s “denial, or failure to grant, licenses to import rice outside of the tariff rate quota” was “a quantitative import restriction, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture” because it had “restricted the importation of rice for periods of time.”<sup>368</sup> Similarly, Indonesia’s restriction of imports based on the harvest periods of its domestic products restricts the importation of certain horticultural products during specified periods of the year.

236. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, the import limitation based on harvest periods restricts the volume of horticultural products imported into Indonesia, and thus constitutes a “quantitative import restriction” or “similar border measure” in breach of Article 4.2.

##### **5. The Restriction on the Importation of Horticultural Products Based on Storage Capacity Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

237. In Section IV.B.5., the United States demonstrated that Indonesia limits the importation of covered horticultural products by requiring RIs to own their storage facilities and by limiting the quantity specified in the Import Approval to the RI’s storage capacity.<sup>369</sup> This requirement is a “restriction” inconsistent with Article XI:1 of the GATT 1994 and is also inconsistent with Article 4.2 of the Agreement on Agriculture because it is a “quantitative import restriction” or “similar measure” within the meaning of Article 4.2.

238. Under this requirement, an RI cannot import horticultural products without ownership of storage facilities, and the quantity it is allowed to import in each semester can be no greater than the total capacity of its storage facilities. As described above, this requirement limits the quantity of horticultural products that can enter the Indonesian market. First, because the Import Approval covering a six-month semester only reflects a single use of the RI’s total storage capacity, this requirement excludes the capacity created by multiple potential turnovers in inventory during the semester. Second, this requirement unnecessarily excludes importation of horticultural products that could be stored in leased or rented storage facilities.

239. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, the import limitation based on harvest periods restricts the volume of horticultural products

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<sup>367</sup> See *supra* sec. IV.B.4.a.

<sup>368</sup> *Turkey – Rice*, paras. 7.51, 7.117 and 7.121.

<sup>369</sup> See *supra* sec. IV.B.5.

imported into Indonesia, and thus constitutes a “quantitative import restriction” or “similar border measure” in breach of Article 4.2.

**6. The Restriction on the Importation of Horticultural Products Other Than for Certain Limited Purposes Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

240. The United States demonstrated above that Indonesia’s use, sale, and transfer requirements for imported horticultural products, which prohibit the importation of horticultural products except for certain specific purposes, are inconsistent with Article XI:1 of the GATT 1994.<sup>370</sup> These requirements are also inconsistent with Article 4.2 of the Agreement on Agriculture because they are “quantitative import restrictions” or “similar border measures” within the meaning of Article 4.2.

241. Under Indonesia’s use, sale, and transfer requirements, RIs cannot import horticultural products for selling directly to consumers and retailers and PIs cannot sell or transfer their imported horticultural products to another entity.<sup>371</sup> RIs must sell their imports to distributors and PIs can only import horticultural products as raw materials for their own industrial production process. These requirements unnecessarily increase the costs of purchasing or using imported horticultural products in Indonesia, and thereby, restrict the quantity imported. By forcing importers to sell imported horticultural products through distributors, both RIs and retailers must bear the cost of middlemen regardless of whether a more cost-effective business model could be employed. Imported horticultural products become riskier and potentially more expensive for PIs to use, because they cannot sell or transfer any excess products leftover from the production process.

242. The panel in *India – Quantitative Restrictions* also considered an import licensing regime that included such a use restriction, specifically, a requirement that goods be imported only by their “actual user.” The panel found that the “actual user” requirement was a “restriction” inconsistent with Article XI:1, because it “preclude[d] imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.”<sup>372</sup> Based on this finding, the panel went on to find that the restriction also was inconsistent with Article 4.2.<sup>373</sup> Based on the foregoing, and for the same reasons they breach Article XI:1 of the GATT 1994, Indonesia’s use requirements are “quantitative import restrictions” or “similar border measures” inconsistent with Article 4.2.

**7. The Reference Price Requirement Constitutes a Minimum Import Price or Similar Border Measure Inconsistent with Article 4.2**

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<sup>370</sup> See *supra* sec. IV.B.6.

<sup>371</sup> See *supra* Section IV.B.6.

<sup>372</sup> *India – Quantitative Restrictions*, para 5.142.

<sup>373</sup> *India – Quantitative Restrictions*, paras. 5.143, 5.239, 5.242.

243. As demonstrated in Section IV.B.7., Indonesia imposes a Reference Price requirement in which importation of chilies and fresh shallots is postponed if their market prices fall below the Reference Prices set by government. This requirement is inconsistent with Article 4.2 of the Agreement on Agriculture because it constitutes a “minimum import price” or “similar border measure” within the meaning of footnote 1 to that article.

244. The Appellate Body in *Chile – Price Band System* explained that the term “minimum import price,” under Article 4.2, “refers generally to the lowest price at which imports of a certain product may enter a Member’s domestic market.”<sup>374</sup> In this case, the lowest prices at which chilies and fresh shallots may enter Indonesia are the Reference Prices set by the government. Importers cannot import chilies or fresh shallots unless their market prices reach or exceed their Reference Prices.

245. The Reference Price requirement, aside from being a “minimum import price,” would also constitute a “similar border measure” because, like a minimum import price, it sets a price floor below which chilies and fresh shallots may not enter Indonesia’s domestic market. In analyzing “similarity” with minimum import price in the context of footnote 1, the Appellate Body in *Peru-Agriculture Products* stated that similarity must have “sufficient number of characteristics with, and has a design, structure, operation and impact similar, to a minimum import price.”<sup>375</sup> As noted above, the Reference Price requirement is similar to a minimum import price: they both involved set prices below which chilies and fresh shallots are not allowed to enter the Indonesian market. Therefore, they share a similar characteristics, design, and structure.

246. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, Indonesia’s Reference Price requirement is a “minimum import price” or “similar border measure” inconsistent with Article 4.2 of the Agreement on Agriculture.

## **8. The Restriction on the Importation of Horticultural Products Harvested More than Six Months Previously Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

247. As discussed in Section IV.B.8, Indonesia requires that all imported fresh horticultural products must have been harvested within six months of importation. This requirement is a “restriction” inconsistent with Article XI:1 of the GATT 1994. For similar reasons, the six month harvest requirement is a “quantitative import restriction” or “similar border measure” within the meaning of Article 4.2 of the Agreement on Agriculture.

248. Indonesia imposes six-month harvest requirement by mandating that RIs submit a statement attesting that imported products have not been harvested more than six months prior to importation in order to obtain their RIPHS for the semester. This requirement makes no

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<sup>374</sup> *Chile – Price Band System (AB)*, para. 236; see *Chile – Price Band System (Article 21.5 – Argentina)*, para. 7.30; *Peru – Agricultural Products (AB)*, para 5.129.

<sup>375</sup> *Peru – Agricultural Products*, para. 5.144 (*Quoting Chile – Price Band System (AB)*, para. 193.)

distinction based on the type and storage characteristics of the products and, thus, restricts the quantity of horticultural products that could be stored for more than six months and shipped to global markets year round. For example, for apples harvested in October and kept fresh in controlled atmosphere storage for year-round shipping, importation to Indonesia is prohibited from April to October of the following year because of the six-month harvest requirement.<sup>376</sup>

249. As previously discussed, the panel in *Turkey – Rice* found that Turkey’s failure to permit rice imports outside of the tariff rate quota was “a quantitative import restriction, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture” because it “restricted the importation of rice for periods of time.”<sup>377</sup> Similarly, the six-month harvest requirement has the effect of restricting importation of certain horticultural products for up to six months out of every year. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, Indonesia’s requirement is a “quantitative import restriction” or “similar border measure” inconsistent with Article 4.2.

**9. Indonesia’s Import Licensing Regime for Horticultural Products, As a Whole, Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

250. The United States has shown previously that, in addition to imposing prohibitions and restrictions on trade, within the meaning of Article XI:1 of the GATT 1994, Indonesia’s import licensing regime for horticultural products is also, as a whole, inconsistent with that provision.<sup>378</sup> For the same reasons, Indonesia’s import licensing regime for horticultural products, as a whole, is inconsistent with Article 4.2 of the Agreement on Agriculture.

251. Operating as a whole, Indonesia’s import licensing regime is a “quantitative import restriction” within the meaning of Article 4.2. Through its interdependent requirements concerning RI and PI designations, and RIPHs and Import Approvals, the regime imposes explicit and implicit quantitative restrictions on imports. As described in Section IV.B.2 above during each six month semester, Indonesia restricts the quantity of imports through inflexible type, quantity, country of origin, and port of entry requirements that do not allow importers to import more or different products than those specified on the RIPH and Import Approval. And importers may not apply for new licenses or request amendments to their current licenses once the semester has begun. In addition, the application windows and validity periods prevent imports altogether at the end of each semester for four to six weeks.<sup>379</sup> Together, these measures restrict the overall quantity of imports and prevent importers from adjusting to market, supply, and logistical changes that may arise throughout the semester

252. Other requirements in the import licensing regime also operate to further restrict the quantity of imported horticultural products. For example, Indonesia limits or stops the

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<sup>376</sup> See *supra* sec. IV.B.8.

<sup>377</sup> *Turkey – Rice*, paras. 7.51, 7.117 and 7.121.

<sup>378</sup> See *supra* sec. IV.B.9.

<sup>379</sup> See *supra* sec. IV.B.1.

importation of horticultural products during the domestic harvest seasons of the same products. Similarly, the Reference Price requirements prohibit the importation of chilies and fresh shallots when their market prices fall below the Reference Prices set by the government. Indonesia also limits the quantity specified on any Import Approval granted to the total capacity of the RIs' storage facilities. And on top of these restrictions, Indonesia prohibits the importation of any fresh horticultural products harvested more than six months previously, which stops importation of certain fruits for up to six months.

253. In addition to these explicit limitations, the Indonesian import licensing regime contains other requirements that discourage RIs from requesting the quantities they might otherwise choose to import. The 80 percent requirement, for example, restricts imports by penalizing importers who do not import sufficient quantities during every semester, causing RIs to be cautious in the quantities they request in their applications. The use, sale, and transfer requirements have the effect of restricting import quantities by artificially restricting commercial opportunities and increasing costs associated with importation of horticultural products.

254. Thus, when viewed as a whole, Indonesia's import licensing regime restricts imports of horticultural products into Indonesia, prohibiting some products altogether and restricting others in the various ways described above. And, as discussed above,<sup>380</sup> the regime has been effective in reducing imports of horticultural products. For all of these reasons, and for the same reason it breaches Article XI:1 of the GATT 1994, the import licensing regime as a whole constitutes a "quantitative import restriction" or "similar border measure" in breach of Article 4.2 of the Agreement on Agriculture.

#### **D. Indonesia's Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia's Obligations under Article XI:1 of the GATT 1994**

255. Indonesia's import licensing regime for animals and animal products imposes impermissible "restrictions" and "prohibitions" within the meaning of Article XI:1 of the GATT 1994. As explained above, "restriction," as used in Article XI:1, refers to "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation," i.e., "to something that has a limiting effect."<sup>381</sup> "Prohibition" refers to a "legal ban on the trade or importation of a specified commodity."<sup>382</sup> Thus, Article XI:1 establishes a "general ban on import or export restrictions or prohibitions" other than duties, taxes, or other charges.<sup>383</sup>

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<sup>380</sup> See *supra* secs. IV.B.4, IV.B.9.

<sup>381</sup> See *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553); *Argentina – Import Measures*, para. 5.217 (quoting same).

<sup>382</sup> *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); *Argentina – Import Measures*, para. 5.217 (quoting same).

<sup>383</sup> See *India – Quantitative Restrictions (Panel)*, para. 5.128; *India – Autos (Panel)*, para. 7.265; *China – Raw Materials (Panel)*, para. 7.206; *Colombia – Ports of Entry*, paras. 7.233-235.

256. Indonesia's import licensing regime for animals and animal products breaches Article XI:1 as a whole because it constitutes an overall limitation or limiting condition on importation, or has a limiting effect on importation. Indonesia's regime also imposes the following specific prohibitions and restrictions on importation:

- Importation of products not listed in the MOT and MOA import licensing regulations is prohibited;
- Limited application windows and validity periods restrict market access during certain times;
- Once an import period begins, importation of animals and animal products is restricted to products of the type, quantity, country of origin, and port of entry listed on the Recommendations and Import Approvals valid for that period;
- Permission to import beef is contingent on an importer having imported at least 80% of the quantity specified on its Import Approval(s) for the previous year;
- Importation of animals and animal products other than for certain specified purposes is prohibited;
- Permission to import beef is contingent on purchasing beef from local slaughterhouses; and;
- Importation of certain products is prohibited if the market price of secondary cuts of beef drops below a set level.

257. Based on each of these separate elements, and based on its operation as a whole, Indonesia's import licensing regime for animals and animal products breaches Article XI:1 of the GATT 1994. In this section, the United States explains how each of the seven separate prohibitions or restrictions is inconsistent with Article XI:1 and then explains how Indonesia's import licensing regime as a whole is inconsistent with that provision.

**1. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia's Regulations Is Inconsistent with Article XI:1**

258. Indonesia's import licensing regime bans the importation of certain animals and animal products by allowing the importation only of those products listed in the appendices to its import licensing regulations. This ban on importing certain products is inconsistent with Article XI:1 of the GATT 1994 because it is a prohibition within the meaning of Article XI:1.<sup>384</sup>

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<sup>384</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

a. *Indonesia’s Positive List of Permissible Imports Is a “Prohibition”  
Within the Meaning of Article XI:1*

259. A prohibition within the meaning of Article XI:1 of the GATT 1994 includes a “legal ban on the ... importation of a specified commodity.”<sup>385</sup> Indonesia’s import licensing regulations for animals and animal products impose a ban on the importation of certain products by prohibiting the importation of any animal or animal product that is not listed in the appendices of both the Ministry of Trade and Ministry of Agriculture import licensing regulations (MOT 46/2013 and MOA 139/2014).

260. As discussed above, MOT 46/2013, as amended, and MOA 139/2014, as amended, list all the types of animals and animal products “that can be imported” into Indonesia.<sup>386</sup> Numerous types of animals and animal products are not listed in the appendices to these regulations, including chicken cuts and parts (frozen and fresh or chilled) and secondary cuts of beef.<sup>387</sup> Applications for Recommendations or Import Approvals to import animals or animal products that are not listed in the appendices of *both* regulations will not be granted. And importers are prohibited from importing animals and animal products not specified on a valid Recommendation and Import Approval.<sup>388</sup>

261. Animals and animal products not listed in the appendices to MOT 46/2013, as amended, and MOA 139/2014, as amended, are therefore banned.<sup>389</sup> Trade data for certain products that were removed from the list of permitted products with the issuance of MOA 139/2014 illustrate the ban, showing that beef liver imports, for example, stopped abruptly in early 2015, when MOA 139/2014 became effective.<sup>390</sup>

262. Panels in previous disputes have found that measures that operate as bans on the importation of particular products are inconsistent with Article XI:1. For example, the panel in *US – Poultry (China)* based its conclusion that the challenged measure was a prohibition

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<sup>385</sup> *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363); *Argentina – Import Measures (AB)*, para. 5.217.

<sup>386</sup> See *supra* sec. III.B.3.b; MOT 46/2013, as amended, article 2(2) (JE-21); *id.* Appendix I, Appendix II (JE-21); MOA 139/2014, as amended, article 8 (JE-28); *id.* Appendix I, Appendix II.

<sup>387</sup> See *supra* paras. 108-109; Meat Industry Letter, at 2 (Exh. US-44).

<sup>388</sup> MOA 139/2014 as amended, article 33(b) (JE-28); MOT 46/2013 as amended, article 30(2)-(3) (JE-21).

<sup>389</sup> See MOA 139/2014 Letter (Exh. US-41) (stating: “In MOA Regulation No 139/2014, Secondary Cut is excluded from attachment for type of beef that allowed to be imported into Indonesian territory including Brisket Point End and Brisket Navel End. Specifically for rib part, bone-in and bone-less Short Rib is includes in Prime Cuts category under HS Code 02.02.30.00.00.”); Wright, *GAIN Report No. ID1457: Indonesia Issues New Beef Import Regulations for 2015* (Exh. US-36) (stating that MOA 139/2014 listed the “beef cuts [that] are allowed for import,” and omitted several cuts which were previously explicitly permitted, including secondary cuts of beef, beef heart, and beef liver, implying they are not permitted for export to Indonesia); Wright, *GAIN Report No. ID1527: Beef and Horticultural Import License Update* (Exh. US-40) (referring to the MOA’s “ban on secondary cuts and offals”).

<sup>390</sup> See “Query: Importation of Bovine Livers, Frozen, from 2011-2015, Monthly,” *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-42).

inconsistent with Article XI:1 on the fact that the measure prohibited the administering agency from “us[ing] appropriated funds to ‘establish’ or ‘implement’ a rule allowing the importation of poultry products from China,” which “had the effect of prohibiting the importation of poultry products from China.”<sup>391</sup> Similarly, the panel in *Brazil – Retreaded Tyres* found that the challenged measure “operate[d] so as to prohibit the importation of retreaded tyres” and, therefore, fell within the scope of Article XI:1.<sup>392</sup>

263. Indonesia’s positive list of animals and animal products that can be imported, and its consequent ban on importation of any products not included on that list, thus constitutes a “prohibition” prohibited by Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining this measure.

## **2. The Application Windows and Validity Periods Constitute Restrictions Inconsistent with Article XI:1**

264. The combination of the limited time windows within which importers can apply for and receive import permits and the short validity periods within which imports can enter Indonesia results in periods of time during which no imports can be made. These requirements acting in combination are inconsistent with Article XI:1 of the GATT 1994 because they constitute a restriction within the meaning of Article XI:1, that is, they are a limitation or limiting condition on importation or have a limiting effect on importation.<sup>393</sup>

### *a. The Application Windows and Validity Periods Are a “Restriction” Within the Meaning of Article XI:1*

265. Indonesia’s application window and validity period requirements are a “restriction” under Article XI:1. The structure of these requirements causes a period of several weeks at the end of one validity period and the beginning of another where products from Members that, like the United States, are far from Indonesia, *cannot* be exported to Indonesia. Opportunities to import such products into the Indonesian market therefore will be limited.<sup>394</sup>

266. As described in section III.B.3.c, Import Approvals are issued four times a year for a single three-month validity period (January to March, April to June, July to September, or

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<sup>391</sup> *US – Poultry (China)*, para. 7.457.

<sup>392</sup> *Brazil – Retreaded Tyres (Panel)*, para. 7.14; *see also US – Shrimp (Panel)*, para. 7.16 (finding that the challenged measure “expressly requires the imposition of an import ban on imports from non-certified countries. . . . In other words, the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be ‘prohibitions or restrictions’ within the meaning of Article XI.”); *Canada – Periodicals (Panel)*, para. 5.5 (“Since the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by its terms is inconsistent with Article XI:1 of the GATT 1994.”).

<sup>393</sup> These requirements are not duties, taxes, or other charges, and, therefore, are within the scope of Article XI:1 of the GATT 1994.

<sup>394</sup> *See supra* sec. IV.A.1; *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

October to December).<sup>395</sup> Import Approvals can be applied for only during the month preceding the start of a period; they cannot be submitted in advance. Further, an Import Approval application can be submitted only after the importer has received a Recommendation from the Ministry of Agriculture, which are issued on a rolling basis only during the month prior to the start of a validity period.<sup>396</sup>

267. In reality, therefore, importers often have less than a month to apply for an Import Approval, and the application window for Recommendations is sometimes delayed, which in turn shortens the application window for Import Approvals and can delay their being issued.<sup>397</sup> If there is no delay, Import Approvals are issued on a date (generally not announced in advance) “at the beginning” of an import period.<sup>398</sup> Therefore, permission to import is granted only once the import period has begun, and sometimes well into the period.

268. This timing matters because Indonesia requires that, for animal or animal product imports to be accepted into Indonesia, the relevant Import Approval number must be written on the Certificate of Health that is issued in the products’ country of origin.<sup>399</sup> The effect of this requirement is that importers cannot begin placing orders, and exporters cannot begin shipping, until after Import Approvals have been issued for that period. Further, once orders are placed, it takes a certain amount of time for those products to be inspected, transported to a port, and shipped to Indonesia. For U.S. products, for example, this process takes at least four to six weeks.<sup>400</sup> Thus, the earliest that U.S. animals and animal products could reach Indonesia (assuming Recommendations and Import Approvals are issued on the first day of the validity period) is about one month after the start of a validity period.

269. Moreover, all animals and animal products imported during a validity period (i.e. imported pursuant to Import Approvals valid for that period) must arrive in Indonesia and clear

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<sup>395</sup> MOT 46/2013, as amended, article 12(1)-(2) (JE-21).

<sup>396</sup> MOT 46/2013, as amended, article 12(2) (JE-21); *id.* article 11(1)-(2) (stating that, to receive an import approval, importers must attach their recommendation); MOA 139/2014 as amended, article 29 (JE-28) (stating that recommendations are issued in December, March, June, and September).

<sup>397</sup> *See supra* sec. III.B.3.c.

<sup>398</sup> MOT 46/2013, as amended, article 12(2) (JE-21).

<sup>399</sup> Ministry of Trade, Import Approval for Beef (Exh. US-43) (stating that the “number and date” of the importer’s import approval must be written on the Certificate of Health issued by the product’s country of origin, meaning that the Certificate of Health *cannot* be issued, and thus the goods *cannot ship*, until after the import approvals for that period have been issued); *see* Meat Industry Letter, at 1 (Exh. US-44) (stating that “products must be purchased, shipped, and customs-cleared by the end of each quarter).

<sup>400</sup> *See, e.g.*, NHC Statements, at 3, 5 (Exh. US-21) (stating that it takes 4-to-6 weeks for products from the United States to reach Indonesia after making the usual, economically determined, stops); “Shipping Times to Jakarta from Various U.S. Ports” (Exh. US-49) (showing that, counting only time on the water – not including time needed to transport products to a port, time for any stops en route, or time to clear customs in Indonesia – it takes at least 3-to-5 weeks to ship freight from various ports in the United States to Indonesia).

customs prior to the end of the period.<sup>401</sup> If the customs clearance process is not completed, even imports that arrived at the Indonesian port within the validity period are prohibited from entering Indonesia and must be re-exported.<sup>402</sup> This means that exporters in the United States must stop accepting orders and shipping to Indonesia four to six weeks before the end of the period, as it takes that long to transport U.S. products to a port, ship them to Indonesia, and clear customs.<sup>403</sup> If importers continue to order and exporters continue to ship later than six weeks prior to the end of the period, they run a significant risk that the products will not arrive and clear customs before the end of the period and, therefore, will not be allowed into Indonesia. Around four weeks prior to the end of the period, this risk becomes a near certainty and shipments from the United States must cease entirely.

270. Thus, in light of these market realities, Indonesia’s application window and validity period requirements impose a significant limitation on importation and have a limiting effect on imports of U.S. products into Indonesia. Importers cannot receive Import Approvals until the beginning of an import period, but importers cannot place orders until after Import Approvals are issued. Due to the distance and shipping time, this means that U.S. products cannot begin entering Indonesia until four to six weeks into the relevant import period. Importers also must stop placing orders for imports from the United States four to six weeks prior to the end of the period.

271. Consequently, there is at least one month at the end of each period when Indonesian importers seeking to import animals or animal products are *precluded* from choosing U.S. products due to the structure of the application window and validity period requirements. U.S. products ordered during this time could not arrive by the end of the current validity period, and importers cannot place orders for U.S. products for the next period because they do not yet have their Import Approvals.<sup>404</sup> These periods without orders and shipments add up to four to six *months* per year during which U.S. products cannot be shipped to Indonesia. Thus, for a third to half of each year, U.S. products are denied the opportunity to compete in the Indonesian market.

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<sup>401</sup> See Ministry of Trade, Import Approval for Beef (Exh. US-43) (stating that the import approval is valid for one validity period “until December 31, 2014, as proven by the date of a customs registration notice, Manifest (BC 1.1), in accordance with the valid customs provisions).

<sup>402</sup> As described above, this general rule is subject to the limited exception that an importer can apply to extend the validity period of its Import Approval for products that were shipped prior to end of the validity period but failed to clear customs by the last day. However, the extension is not automatic, is for a maximum of 30 days, and cannot be requested for the fourth quarter of any year. Further, an importer is eligible for a maximum of one extension per import period. See *supra* n.213.

<sup>403</sup> NHC Statements, at 3 (Exh. US-21) (stating that “we cannot ship during the last thirty-five to forty days of each period because the product would not arrive and clear customs before the end of the period”).

<sup>404</sup> See NHC Statements, at 3 (Exh. US-21) (stating that U.S. exporters cannot ship “even if the importers I work with would want to put in additional orders during the last six weeks or so of the period”); Letter to Mr. Bob Macke, Acting Deputy Administrator of the Foreign Agriculture Service, U.S. Department of Agriculture, from Representatives of the American Meat Industry, at 1, Oct. 27, 2015 (Exh. US-44) (stating that Indonesia’s quarterly permit system “effectively allows for purchasing activity to take place only within the first several weeks of every quarter”).

272. As discussed above in the context the analogous restriction on horticultural products, these requirements impose a limitation on importation or have a limiting effect on imports, and therefore constitute a “restriction” under Article XI:1.<sup>405</sup> The *Colombia – Ports of Entry* panel found that a measure restricting imports from Panama to two Colombian ports had a limiting effect” on imports because “uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”<sup>406</sup> Indonesia’s application window and validity periods, however, are far more restrictive in that they wholly exclude U.S. animals and animal products from entering Indonesia for four to six weeks each quarter, and a total of four to six months each year.

273. The application window and validity period requirements imposed by Indonesia’s regulations are a limitation on imports or have a limiting effect on imports because they operate to wholly exclude U.S. animals and animal products from entering the Indonesia market for four to six weeks out of every quarter, and four to six months out of every year. These requirements therefore constitute a “restriction” within the scope of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining these requirements.

**3. Restricting Imports of Animals and Animal Products During a Validity Period to Those of the Quantity, Type, Country of Origin, and Port of Entry Listed on the Original Import Documents for that Period Is Inconsistent with Article XI:1**

274. During each three-month period, Indonesia limits the imports of animals and animal products to products of the type, quantity, country of origin, and port of entry listed on the Recommendations and Import Approvals granted at the beginning of that period. Importation of any animals and animal products without permits covering their type, quantity, country of origin, and port of entry is prohibited. But once an import period begins, importers cannot apply for new permits to import different or additional products. Thus imports are strictly limited to the products specified on outstanding permits. This limitation is inconsistent with Article XI:1 of the GATT 1994 because it is a restriction on importation within the meaning of Article XI:1.<sup>407</sup>

*a. Indonesia’s Requirement Is A “Restriction” Within the Meaning of Article XI:1*

275. As discussed above, a measure is a “restriction” under Article XI:1 if it imposes a limitation or a limiting condition on importation or has a limiting effect on importation.<sup>408</sup> Here, the requirement provides that only certain imports, as listed on the Recommendations and Import

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<sup>405</sup> See *supra* paras. 157-158; See *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>406</sup> *Colombia – Ports of Entry*, para. 7.274.

<sup>407</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>408</sup> See *supra* sec. IV.A.1; *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

Approvals issued at the outset of each import period, are allowed to enter the territory of a Member during that period. Such a measure imposes a limitation or limiting condition on importation, or has a limiting effect on imports, and thus constitutes a restriction on imports within the meaning of Article XI:1.

276. As explained above, during any import period, the only products that may be imported are those that conform to the type, quantity, country of origin, and port of entry specifications on importers' original Recommendations and Import Approvals, as issued at the start of the period. All other imports are prohibited.<sup>409</sup> Further, once a validity period begins, importers cannot change the products listed on their import permits or apply for new permits for different or additional products, or for products shipping from, or into, a new location.<sup>410</sup>

277. Importers that do not comply with this requirement are subject to sanctions, including revocation of their Recommendations and ineligibility for future Recommendations revocation of their Import Approvals and RI designations,<sup>411</sup> and any goods not in compliance with the requirement will be re-exported at the importer's expense.<sup>412</sup> Once a period begins, therefore, importers cannot make changes based on market or other developments that may be necessary to meet current demand, whether because certain products are no longer needed, because new or additional products are needed due to the unavailability or insufficiency of the original orders, or even due to changed circumstances regarding the importer itself.

278. For example, the importer who obtained approval to import 125 tons of frozen boneless secondary cuts of beef from the United States through the port of Jakarta from October to December of 2014<sup>413</sup> cannot respond to market forces or other developments as any rational economic actor would once the period has begun. If, for example, the price of beef rises in the

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<sup>409</sup> MOA 139/2014, as amended, article 33(b) (JE-28) (stating that importers are “prohibited from importing types/categories of carcasses, meat, and/or their processed products other than what is included in their Recommendation”); MOT 46/2013 as amended, article 30(2)-(3) (JE-21) (stating that imports “whose quantity, type, business unit, and/or country or origin is not in accordance with their Import Approval . . . will be re-exported,” with the cost of re-export being borne by the importer).

<sup>410</sup> MOA 139/2014, 23(1) (JE-28) (stating that recommendations can be applied for only in December, March, June, and September, i.e. the months preceding the four import approval validity periods); *id.* article 26 (stating that a recommendation application will be rejected if it does not meet the requirements described in article 23, *inter alia*); *id.*, article 33(a) (prohibiting importer from requesting changes to the elements specified on their recommendations once recommendations have been issued); MOT 46/2013, 12(1) (JE-21) (stating that import approval applications are accepted only during December, March, June, and September, i.e. the months before the beginnings of the four validity periods).

<sup>411</sup> MOA 139/2014, as amended, article 39(e) (JE-28) (stating that importers that do not comply with the prohibition on requesting changes to their Recommendations or on importing products other than those specified in their Recommendations are submitted to sanction “in the form of Recommendation revocation, not being given Recommendation in the future,” and having their Import Approval and RI status revoked as well); MOT 46/2013, as amended, article 30(1) (JE-21).

<sup>412</sup> MOT 46/2013, as amended, article 30(2)-(3) (JE-21) (stating that imports whose quantity, type business unit and/or country of origin is not in accordance with their Import Approval . . . will be re-exported” and the “cost of re-export . . . is the responsibility of the importer”).

<sup>413</sup> Ministry of Trade, Import Approval for Beef (Exh. US-43)

United States (due, for example, to a strike at a U.S. port or an uptick in demand) but falls in New Zealand, the importer cannot substitute New Zealand beef for U.S.; it can import only U.S. beef, even if it is so expensive that it is unprofitable to do so. Similarly, if demand for secondary cuts falls but demand for offals rises, or if the importer's supplier is short on secondary cuts but has an excess of prime cuts, the importer cannot substitute other cuts for frozen boneless secondary cuts of beef. If demand rises in Indonesia, the importer cannot take advantage of this opportunity by importing more than 125 tons. If there is a port strike in Jakarta, the importer cannot bring the products in through another port. Thus, imports are made more costly and more risky, as companies relying on importation cannot mitigate downside risk and cannot take advantage of any opportunities posed by changing circumstances.

279. The result of this requirement is that: (1) imports of certain products (those for which no Recommendations or Import Approval were granted at the beginning of the import period) are effectively banned until the next period; (2) only a set quantity of each type of product can be imported until the next period; (3) products from WTO Members are restricted to the amounts originally requested by importers (so may be zero for the period); and, (4) if the original port of entry is no longer available or commercially feasible to use, the products cannot enter through a different port. The type, quantity, country of origin, and port of entry requirement imposed through Recommendations and Import Approvals is, therefore, a limitation or limiting condition on importation or a measure with a limiting effect on importation, and thus constitutes a “restriction” within the meaning of Article XI:1.

280. As described above, in discussing the analogous restriction on horticultural products, previous panels have found that measures with similar restrictive effects were restrictions under Article XI:1.<sup>414</sup> Notably, the *India – Autos*, the panel found that a trade balancing requirement restricted imports because there was a practical limit to the amount of products that companies would have the “desire and ability to export,” which would, in turn, limit the quantity of products that they would be permitted to import.<sup>415</sup> The panel in *Argentina – Import Measures* found that the measure at issue was an import restriction because, *inter alia*, it did not “allow companies to import as much as they desire or need without regard to their export performance” and “impose[d] a significant burden on importers that is unrelated to their normal importing activity.”<sup>416</sup> The *Colombia – Ports of Entry* panel found that a measure restricting the entry of imports from Panama to two Colombian ports had a “limiting effect” on imports because “uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise from importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama.”<sup>417</sup>

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<sup>414</sup> See *supra* paras. 165-166 (citing *India – Autos (Panel)*, para. 7.268; *Colombia – Ports of Entry*, paras. 7.274, 7.236-239; *Argentina – Hides and Leather (Panel)*, para. 11.20; *EEC – Oilseeds I* (GATT 1947 Panel); *Japan – Leather II (US)* (GATT 1947 Panel Report).

<sup>415</sup> *India – Autos (Panel)*, para. 7.268.

<sup>416</sup> See *Argentina – Import Measures (Panel)*, para. 6.474.

<sup>417</sup> *Colombia – Ports of Entry*, para. 7.274; *id.*, para. 7.274.

281. Thus, the type, quantity, country of origin, and port of entry requirement strictly limits the products that can be imported once a validity period has begun and, therefore, constitutes a limitation or limiting condition on importation, or has a limiting effect on importation. For these reasons, this requirement operates as a “restriction” prohibited by Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining it.

#### 4. The Realization Requirement Is Inconsistent with Article XI:1

282. Indonesia requires that importers who are licensed to import Appendix I products (i.e. cattle, beef meat, and edible beef offals) must import (“realize”) at least 80 percent of the products listed on their Import Approval(s). This requirement is a restriction within the meaning of Article XI:1 and, therefore, is inconsistent with GATT 1994 Article XI:1.<sup>418</sup>

a. *The Realization Requirement Is a “Restriction” Within the Meaning of Article XI:1*

283. Indonesia’s realization requirement for Appendix I products is a “restriction” under Article XI:1 of the GATT 1994 because it is a condition on importation that induces importers to reduce the quantity of products that they request permission to import and may render the importer ineligible to import products if that condition is not met. The requirement is, therefore, a limitation or limiting condition on importation or has a limiting effect on imports.<sup>419</sup>

284. As described in III.B.3.e above, each importer of Appendix I products (cattle, beef meat, and offal) is required to import “at least 80%” of the products covered by its Import Approvals each year.<sup>420</sup> This requirement is monitored on a monthly basis, as each RI designee is required to submit monthly reports setting out all its imports of animals and animal products and the amount of products remaining under its Import Approval.<sup>421</sup> If an RI designee does not fulfill this reporting requirement three times, the importer’s RI designation is suspended (for an undefined period), leaving the importer unable to apply to import Appendix I products.<sup>422</sup> An importer’s RI designation is also suspended if, at the end of the year, the importer has not met the 80 percent realization requirement.<sup>423</sup> And if an importer fails to meet the requirement twice, its RI designation is revoked and the importer cannot reapply for at least two years.<sup>424</sup>

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<sup>418</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>419</sup> See *supra* sec. IV.A.1; *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>420</sup> MOT 46/2013, as amended, article 13 (JE-21) (stating that “RI-Animals and Animal Products who have received Import Approval, as described in Article 11, paragraph (3), item (a), are required to realize at least 80% (eighty percent) of imports of Animals and Animal Products for 1 (one) year”).

<sup>421</sup> MOT 46/2013, Appendix IV (JE-21).

<sup>422</sup> MOT 46/2013, as amended, article 26 (JE-21).

<sup>423</sup> MOT 46/2013, as amended, article 26 (JE-21).

<sup>424</sup> MOT 46/2013, as amended, articles 27(a), 29 (JE-21).

285. At the end of each import period, therefore, and particularly during the final import period of the year, importers who have not yet brought in 80 percent of the products listed on their Import Approval(s) face a choice: either they import only what they need and allow themselves to become ineligible for a permit for months or years, or they import sufficient quantities to meet the realization requirement, even if they must do so at a loss.

286. In short, the dynamic is the same as on the horticultural products side, namely, that importers are concerned that over-supply of products at the end of an import period will force them to sell products at a loss or lose their eligibility to import.<sup>425</sup> Indeed, in the animal products context the Reference Price requirement (described below) makes importing large quantities during short periods of time to comply with the realization requirement even riskier, as it could cause the price to drop below the Reference Price and cut off imports altogether.

287. The realization requirement, imposed through RI designations and Import Approvals, is a limitation or limiting condition on importation, or has a limiting effect on importation. Specifically, importers are subjected to the requirement as a condition for receiving permission to import, and failure to meet this condition may result in ineligibility to import in future import periods. Further, importers have a strong incentive to ensure that they do not apply for and obtain Import Approvals for greater quantities of products than they are certain they can profitably import and, therefore, apply for import lower quantities of products than they would if the 80 percent requirement did not apply.<sup>426</sup> The realization requirement thereby has a limiting effect on imports, as well.

288. Previous panels have confirmed that measures imposing limits of this kind are “restrictions” under Article XI:1.<sup>427</sup> As discussed above, the *India – Autos* panel considered a measure with a similar limiting effect – namely, a trade balancing requirement placed on importers of auto kits and components – and found it to be a “restriction” under Article XI:1.<sup>428</sup> Although this requirement did not set an “absolute numerical limit,” the panel found that it was a “restriction” because it “induced [an importer] . . . to limit its imports of the relevant products” in relation to its “concern[] about its ability to export profitably.”<sup>429</sup> Therefore, “a manufacturer [was] in no instance free to import, without commercial constraint, as many kits and components as it wishes without regard to its export opportunities and obligations.”<sup>430</sup> The 80 percent realization requirement has a similar limiting effect, in that it causes importers to limit the amount that they request in their Import Approval applications, which then limits the amount they are allowed to import.

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<sup>425</sup> See *supra* paras. 171-174; NHC Statements, at 3 (Exh. US-21).

<sup>426</sup> See NHC Statements, at 3, 5 (Exh. US-21).

<sup>427</sup> See *Argentina – Import Measures (Panel)*, paras. 6.258, 6.461, 6.474; *India – Autos (Panel)*, para. 7.268.

<sup>428</sup> *India – Autos (Panel)*, para. 7.268.

<sup>429</sup> *India – Autos (Panel)*, para. 7.268.

<sup>430</sup> *India – Autos (Panel)*, para. 7.277.

289. The 80 percent realization requirement is thus a limitation or limiting condition on importation that may render an importer ineligible to import products in the future if the condition is not met and that causes importers to reduce the quantity of products they apply for permission to import. It is, therefore, a “restriction” under Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining this requirement.

**5. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Purposes Is Inconsistent with Article XI:1**

290. Indonesia requires, as a condition for importation, that animals and animal products be imported only for certain specific uses. This restriction varies in scope depending on the product at issue, but for all imported products, the permitted uses do not include retail sale in traditional Indonesian markets, where Indonesians purchase the vast majority of their meat. This requirement is a restriction within the meaning of Article XI:1 and, therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>431</sup>

*a. The Limitations on Use Are a “Restriction” Within the Meaning of Article XI:1*

291. Indonesia’s use requirements for imports of animals and animal products are a “restriction” under Article XI:1 of the GATT 1994. The requirements are a condition on importation that limits the opportunities of imported products in the Indonesian market, and thus limits the quantity of imports. The requirements may also render the importer ineligible to import products in the future if the condition is not met. Thus, the requirements are a limitation or limiting condition on importation or have a limiting effect on imports.<sup>432</sup>

292. As described in section III.B.3.f above, under MOT 46/2013, as amended, and MOA 139/2014, as amended, animals can only be imported for purposes of improving genetic diversity, overcoming domestic shortfalls, or for scientific or research purposes.<sup>433</sup> The animal products listed in Appendix I to MOT 46/2013 and MOA 139/2014 (beef meat, and edible beef offals) can be imported only for use in manufacturing, hotels, restaurants, or catering, or for other limited purposes.<sup>434</sup> The animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-beef meats and offals) are permitted to be imported for the same purposes as Appendix I products, and also can be sold in modern markets (i.e., supermarkets and convenience stores).<sup>435</sup>

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<sup>431</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>432</sup> See *supra* sec. IV.A.1; *Argentina – Import Measures(AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>433</sup> See *supra* para. 125; MOT 46/2013, as amended, article 3(1) (JE-21).

<sup>434</sup> MOT 46/2013, as amended, article 17 (JE-21); MOA 139/2014, as amended, article 32(1) (JE-28).

<sup>435</sup> MOA 139/2014, as amended, article 32(2) (JE-28).

293. Importers that do not comply with these requirements become ineligible to import animals and animal products.<sup>436</sup> Specifically, an importer that violates the provisions of MOA 139/2014, as amended, concerning the permitted uses of Appendix I and Appendix II products is subject to having its RI designation (if applicable), Recommendation, and Import Approval revoked, and becomes ineligible to receive Recommendations in the future.<sup>437</sup> Additionally, an Appendix I (beef products) importer that three times fails to submit its distribution report (specifying to whom and for what purpose they sold their products) has its RI designation suspended (for an unspecified period),<sup>438</sup> rendering the importer unable to import Appendix I products.

294. These use restrictions severely limit the opportunities available to imports in the Indonesian market. For animals, the permitted purposes do not include ordinary retail sale or sale for slaughter. Similarly, for beef carcasses and meat listed in Appendix I, the permitted purposes do not include any retail sale, either in modern markets or in traditional markets. For Appendix II (non-beef) animal products, the list does not include sale in traditional markets, either in small family-owned stores (*warungs*) or in “wet markets.”

295. Reports by market analysts show that Indonesian consumers still do at least half of their food shopping at traditional retail outlets.<sup>439</sup> The preference for traditional markets is particularly pronounced with respect to animal products, as demonstrated by a 2010 survey showing that Indonesian consumers made 70 percent of their fresh meat purchases at traditional markets.<sup>440</sup> Thus, the use restrictions for Appendix II products bar imports from competing for a significant portion of the sales in the Indonesian retail food market, while the restrictions for Appendix I products exclude imports from the retail market altogether.

296. As described previously in the context of the use restrictions placed on imports of horticultural products, previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. Notably, the *India – Quantitative Restrictions* panel found that the “actual user” requirement, imposed through India’s import licensing regime was be “a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted.”<sup>441</sup> Further, in *Canada – Provincial Liquor Boards*, the GATT panel found that

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<sup>436</sup> MOT 46/2013, as amended, article 26 (JE-21); MOA 139/2014, 39(d) (JE-28).

<sup>437</sup> MOA 139/2014, 39(d) (JE-28) (stating that importers who violate article 32 of MOA 139/2014 (on the intended uses of Appendix I and Appendix II products) will be subject to sanction in the form of having their Recommendation revoked and not being given a Recommendation in the future, and that it would be proposed to the Ministry of Trade to revoke their Import Approval and RI designation).

<sup>438</sup> MOT 46/2013, as amended, article 26 (JE-21).

<sup>439</sup> See Rohit Razdan et al., McKinsey & Co., *The Evolving Indonesian Consumer*, at 16 (November 2013) (Exh. US-47); Arief Budiman et al., McKinsey & Co., *The New Indonesian Consumer*, at 11 (December 2012) (Exh. US-48).

<sup>440</sup> See Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, at 5-6, Dec. 19, 2014 (Exh. US-58).

<sup>441</sup> *India – Quantitative Restrictions (Panel)*, para. 5.142.

limitations on the points of sale available to imported beer were restrictions within the meaning of Article XI:1.<sup>442</sup> A similar analysis would apply to Indonesia’s measures, as Indonesia’s use restrictions restrict the purposes for which animals and animal products can be imported.

297. Through its use requirements, Indonesia precludes an importer from importing animals and animal products for commercially important purposes, including all retail sale (for Appendix I products) and retail sale in traditional markets (for Appendix II products). If an importer fails to comply with these limitations, Indonesia may revoke altogether that importer’s ability to import. The use requirements are, therefore, a limitation or limiting condition on importation, or a measure having a limiting effect on importation. Consequently, the limited use requirement constitute a “restriction” within the meaning of Article XI:1 of the GATT 1994, and Indonesia breaches Article XI:1 by instituting or maintaining it.

## 6. The Domestic Purchase Requirement Is Inconsistent with Article XI:1

298. Under MOA 139/2014, as amended, Indonesia requires importers of beef to purchase beef from local slaughterhouses as a condition of being eligible to receive permission to import. This requirement is a restriction within the meaning of Article XI:1 and, therefore, is inconsistent with Article XI:1 of the GATT 1994.<sup>443</sup>

### a. *The Domestic Purchase Requirement is a “Restriction” Within the Meaning of Article XI:1*

299. Indonesia’s domestic purchase requirement for beef importers is a “restriction” under Article XI:1 because it is a condition on importation that may render the importer ineligible to import if the condition is not met and that has a limiting effect on imports. An importer will import not solely according to commercial considerations, but also in relation to the amount of local beef available to satisfy this requirement. The domestic purchase requirement thus constitutes a “restriction” within the meaning of Article XI:1.<sup>444</sup>

300. As described in section III.B.3.g above, importers are allowed to import beef only on the condition that they “absorb” (i.e. purchase) local beef in an amount equivalent to three percent of the quantity they import.<sup>445</sup> Only purchases from certain designated abattoirs and only purchases of male cattle count towards this requirement.<sup>446</sup> In a Recommendation application, an importer must submit proof, verified by the provincial agency or the municipality from which the Indonesian domestic beef originates, that it has met this requirement.<sup>447</sup> A Recommendation

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<sup>442</sup> *Canada – Provincial Liquor Boards (EEC)*, adopted on 22 March 1988, BISD 35S/37, para. 4.24.

<sup>443</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>444</sup> See *supra* sec. IV.A.1; *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>445</sup> See *supra* sec. III.B.3.g.

<sup>446</sup> Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

<sup>447</sup> MOA 139/2014, as amended, article 24(1)(l) (JE-28).

application without proof that the domestic purchase requirement has been met will be rejected,<sup>448</sup> and an importer that does not comply with the requirement is subject to sanction by having its RI designation, Recommendation, and Import Approval revoked and by becoming ineligible for a future Recommendation.<sup>449</sup>

301. This requirement operates as a limitation or limiting condition on imports, or has a limiting effect on imports, in three ways. First, the domestic purchase requirement is designed to substitute imports with domestic products. That is, the requirement compels importers to purchase locally produced goods before they can import foreign products, such that at least a portion of the products that otherwise would have been imported are replaced with domestically-produced goods.

302. Second, the domestic purchase requirement is a limiting condition on imports because it ties the permissible quantity of beef imports to the supply of local beef that is available for purchase towards the requirement. For example, if an importer wishes to import 100 tons of beef meat, she must first purchase three tons of local beef meat (and include evidence of this purchase in her Recommendation application). If only two tons of beef eligible to count toward the requirement are available for purchase, she can only import sixty-six tons.

303. This limiting effect is not theoretical. Compliance with the domestic purchase requirement is very difficult in practice because of the short supply of domestic beef in Indonesia in recent years and the restrictions on the cattle that can be counted towards the requirement (only male cattle from certain abattoirs).<sup>450</sup> Due to these market conditions, importers have difficulty locating and purchasing local beef amounting to three percent of the quantity of beef meat they wish import.<sup>451</sup> Consequently, importers are forced to reduce their planned imports and request lower quantities in their Recommendations and Import Approvals applications than they would in the absence of the domestic purchase requirement.

304. Third, the domestic purchase requirement adds unnecessarily to the costs of importation by requiring importers to purchase local beef without any business purpose. These costs can be significant because, as noted, local beef is in short supply, and only male cattle from certain abattoirs qualify towards the requirement.<sup>452</sup> In fact, the shortage of local beef in Indonesia has caused the market price of beef to skyrocket, which has made complying with the domestic

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<sup>448</sup> MOA 139/2014, as amended, article 26 (JE-28) (stating that if a recommendation application does not meet the requirements described in article 5, *inter alia*, the application will be rejected).

<sup>449</sup> MOA 139/2014, as amended, article 39(b)-(c) (JE-28) (stating that importers that violate the provisions of article 5 or article 24(1)(l), *inter alia*, “will be subject to sanctioning in the form of Recommendation revocation, not being given Recommendation in the future, and will have their Import Approval Letter (SPI) and status as a Registered Importer (IT) of Animal Products proposed to the Minister of Trade for revocation”).

<sup>450</sup> Wright, *GAIN Report No. ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

<sup>451</sup> Wright, *GAIN Report No. ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

<sup>452</sup> Wright, *GAIN Report No. ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

purchase requirement both more difficult (in terms of locating domestic beef) and more costly.<sup>453</sup> Indeed, the domestic purchase requirement sets off a cycle of increasing beef scarcity: there is a domestic beef shortage, which makes the requirement difficult and expensive to comply with, which restricts the volume of imports, which makes beef even scarcer and more expensive and the requirement even more difficult and expensive to comply with.<sup>454</sup>

305. Previous panels have found that measures imposing limits of this kind are restrictions under Article XI:1. The panel in *Argentina – Import Measures* considered a similar measure, which included a requirement to incorporate a minimum level of local content into goods produced in Argentina.<sup>455</sup> The panel in that dispute found:

The required increase of local content, either by purchasing from domestic producers or by developing local manufacture (*sic*), has a direct limiting effect on imports, because the measure is designed to force the substitution of imports in line with policies set by Argentina in the PEI 2020.<sup>456</sup>

306. The panel also found that the measure had a restrictive effect because it “may result in costs unrelated to the business activity of the particular operator.”<sup>457</sup> And, as the panel explained: “Extra costs as a general matter will discourage importation and, thus, will have an additional limiting effect on imports.”<sup>458</sup> As previously discussed, other previous panels also have found that a restriction within the meaning of Article XI:1 may operate through a measure’s impact on transaction costs or market access.<sup>459</sup>

307. The panel in *India – Autos* made a similar finding concerning a trade balancing requirement, under which companies were required to ensure that their exports were of at least equivalent value to their imports.<sup>460</sup> The panel found that, although the requirement did not set an explicit limit on the value of imports, it was nevertheless a restriction because:

[T]here would necessarily have been a practical threshold to the amount of exports that each manufacturer could expect to make, which in turn would determine the amount of imports that could be made. This amounts to an import restriction. . . . [A] manufacturer is in no instance free to import, without

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<sup>453</sup> Wright, *Beef and Horticultural Import License Update*, at 2 (Exh. US-40); see Michael Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry,” *Reuters*, March 4, 2015 (Exh. US-8).

<sup>454</sup> See Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry” (Exh. US-8).

<sup>455</sup> *Argentina – Import Measures (Panel)*, para. 6.255.

<sup>456</sup> *Argentina – Import Measures (Panel)*, para. 6.258.

<sup>457</sup> *Argentina – Import Measures (Panel)*, para. 6.261.

<sup>458</sup> *Argentina – Import Measures (Panel)*, para. 6.261.

<sup>459</sup> See *Colombia – Ports of Entry*, paras. 7.236-38 (discussing panel findings in *Argentina – Hides and Leather*, *Japan – Leather*, and *Brazil – Retreaded Tyres* and GATT panel findings in *Canada – Provincial Liquor Boards (EEC)* and *EEC – Minimum Import Prices*).

<sup>460</sup> *India – Autos (Panel)*, para. 7.268.

commercial constraint, as many kits and components as it wishes without regard to its export opportunities and obligations.<sup>461</sup>

Indonesia’s domestic purchase requirement also has a limiting effect on imports by forcing substitution of imports, imposing additional costs on importation, and limiting the amount of products that importers can bring in based on the availability of local products.

308. Thus the domestic purchase requirement is a measure that is a limitation or limiting condition on importation or has a limiting effect on importation. It is, therefore, a “restriction” within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining it.

## **7. The Reference Price Requirement Is Inconsistent with Article XI:1**

309. Under MOT 46/2013, as amended, Indonesia allows importation of all cattle and beef products only on the condition that the Indonesian market price of secondary cuts of beef is above the “Reference Price” set by the Ministry of Trade and prohibits importation of all cattle and beef products when the Indonesian market price of secondary cuts of beef falls below the Reference Price. This requirement is a prohibition or restriction within the meaning of Article XI:1 and, therefore, is inconsistent with GATT 1994 Article XI:1.<sup>462</sup>

### *a. The Reference Price Requirement Is a “Restriction” Within the Meaning of Article XI:1*

310. Indonesia’s Reference Price limits importation of covered products to periods when the market price of secondary cuts of beef remains above a government-determined level and is a prohibition for periods when the market price falls below that level. Importation is therefore limited to periods when the market price of secondary cuts of beef is above the Reference Price. The requirement is thus a limitation or limiting condition on importation, or has a limiting effect on importation. Accordingly, the reference price requirement is a “restriction” or “prohibition” within the meaning of Article XI:1.<sup>463</sup>

311. As described above, MOT 46/2013, as amended, provides that, if the market price of secondary cuts of beef falls below a Reference Price set by the Minister of Trade (Rp 76,000.00/kg, as set by MOT 46/2013), all imports of Appendix I products are prohibited until the market price again rises to the Reference Price.<sup>464</sup> This requirement places an explicit limitation on imports of Appendix I products, i.e., they are permitted only if the market price of secondary cuts of beef is above the Reference Price and are otherwise prohibited.

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<sup>461</sup> *India – Autos (Panel)*, para. 7.277.

<sup>462</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>463</sup> See *supra* sec. IV.A.1; *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

<sup>464</sup> See *supra* sec. III.B.3.h.

312. The Reference Price requirement is similar to a minimum import price requirement, which previous panels have considered in the context of Article XI:1. As discussed above, the *China – Raw Materials* panel recognized the “applicability of Article XI:1 to minimum price requirements.”<sup>465</sup> That panel found that an analogous minimum export price requirement was a “restriction” under Article XI:1, explaining that, “the restriction or limitation on exportation arises from the possibility that a price is set at such a level that exporters cannot find a potential buyer in order to sell their product” and that “the very *potential* to limit trade is sufficient to constitute a ‘restriction[] . . . on the exportation or sale for export of any product’ within the meaning of Article XI:1.”<sup>466</sup>

313. The Reference Price requirement is even more categorical than the minimum import or export prices found by previous panels to be “restrictions.” First, it prohibits *any* imports once the Reference Price has been reached, not only imports sold at prices below that Reference Price. Moreover, Indonesia prohibits imports of *all* beef products, not merely secondary cuts, if the price of secondary cuts falls below the Reference Price.

314. Further, the Reference Price also has a limiting effect on imports at other times because the threat of such a broad restriction reduces the incentives for importation of these products overall. An importer cannot always predict how prices will change, and the risk that the market price of secondary beef cuts will fall below the Reference Price increases the potential costs of contracting for these animals and animal products. Given this risk, importers may refrain from contracting for these products whenever it is even possible that the price could fall below the Reference Price. The requirement thereby has a limiting effect on imports by increasing the risks associated with importation, in addition to prohibiting imports altogether if the price of beef falls below the Reference Price.

315. In addition, the Reference Price requirement would tend to limit importation by discouraging price competition. That is, because imports of all products are prohibited if the market price of secondary cuts falls to or below the Reference Price, importers would be discouraged from competing to introduce lower price imports. This, in turn would reduce commercial opportunities for imports in the Indonesian market.

316. Because the Reference Price requirement restricts importation of Appendix I products to periods when the market price is above the government-set level, and prohibits importation during periods when it is not, the Reference Price requirement is a limitation or limiting condition on importation, or has a limiting effect on importation. Additionally, the requirement is a prohibition, within the meaning of Article XI:1, during certain periods. Accordingly, Indonesia breaches Article XI:1 by instituting or maintaining this requirement.

## **8. Indonesia’s Import Licensing Regime for Animals and Animal Products, As a Whole, Is Inconsistent with Article XI:1**

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<sup>465</sup> See *China – Raw Materials (Panel)*, para. 7.1075 (citing *Japan – Semi-Conductors* (GATT 1947 Panel) paras. 106, 117; *EEC – Minimum Import Prices* (GATT 1947 Panel), para. 4.9).

<sup>466</sup> *China – Raw Materials (Panel)*, para. 7.1081 (citing *Colombia – Ports of Entry*, para. 7.240).

317. Indonesia's imposes numerous restrictions and prohibitions on the importation of animals and animal products through its import licensing regime. As set out above, the United States considers that the requirements that form parts of that regime are each, when considered individually, inconsistent with Article XI:1 of the GATT 1994. Further, when Indonesia's import licensing regime for animals and animal products is considered as a whole, including these overlapping and interdependent requirements, that regime constitutes a restriction inconsistent with Article XI:1.<sup>467</sup>

*a. Indonesia's Import Licensing Regime Imposes "Prohibitions or Restrictions" Within the Meaning of Article XI:1*

318. Indonesia's import licensing regime, maintained through MOT 46/2013, as amended, and MOA 139/2014, as amended, imposes numerous limitations and limiting conditions on importation and has various limiting effects on the importation of animals and animal products. By imposing numerous requirements that importers must meet as conditions for permission to import and on the act of importation, the import licensing regime is, by its design and structure, an instrument through which Indonesia controls and limits the importation of animals and animal products. These requirements restrict and limit importation of animals and animal products in the following manner.

319. Indonesia's import licensing regulations suggest that importers can apply for and obtain Recommendations and Import Approvals to import products in whatever type and quantity, from whatever country of origin, and through whatever port of entry they choose. The reality, however, is quite different. First, as described above, Indonesia prohibits the importation of some animal products, including secondary cuts of beef and poultry cuts, by making them ineligible for Recommendations and Import Approvals.<sup>468</sup> An application for a Recommendation or Import Approval to import these products will be rejected.

320. Even for those products listed in Appendix I and II to MOT 46/2013 and MOA 139/2014 whose import is not prohibited, importers are not, in reality, free to apply for Recommendations and Import Approvals to import whatever products they wish. First, due to the application windows and validity periods, imports are blocked from access to the Indonesian market for several months out of the year, which imposes a limitation on when importation can be performed and on the quantity that can be brought in, particularly when the end of an import period coincides with a time of high demand in Indonesia.<sup>469</sup> The Reference Price requirement also places an explicit limitation on when importation can occur, specifying that all importation of beef products is prohibited when the market price of secondary cuts of beef is below the level set by the government.

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<sup>467</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>468</sup> See MOA 139/2014, as amended, articles 4(2)-(4), 7, 8 (JE-28); MOT 46/2013, as amended, article 11(1)-(2) (JE-21); *id.* article 2 (JE-21). Compare MOA 139/2014, Appendix I (JE-28) (not listing secondary cuts of beef, certain cuts of manufacturing meat or of edible offal of bovine animals, or poultry meat or offals, *inter alia*); MOT 46/2013, Appendix I (JE-21) (not listing poultry meat or offals, *inter alia*).

<sup>469</sup> See *supra* sec. IV.D.2.

321. Further, importers are required to predict in advance precisely the type, quantity, country of origin, and point of entry of all the products that they wish to import because Recommendations and Import Approvals are issued the month before an import period begins and “at the beginning” of the period, respectively, and cannot be amended or supplemented during the period.<sup>470</sup> In and of itself, this requirement means that, once a period starts, importers are not free to import whatever type and quantity of products, from whatever country and through whatever port of entry, would make the most economic sense. Imports are thus directly limited by this requirement.

322. When this requirement is combined with other aspects of Indonesia’s import licensing regime, however, the limitations on importation and limiting effects on imports are exacerbated. The 80 percent realization requirement induces importers to limit the quantities of products they request on their Recommendation and Import Approval applications.<sup>471</sup> The use restrictions restrict the commercial opportunities for importers and therefore artificially suppress imports by limiting the type and quantity of products they apply to import through the uses and markets to which they are limited.<sup>472</sup> The domestic purchase requirement for beef also causes importers to lower the types and quantities of products they apply to import, both due to import substitution and because the quantity of possible imports is tied directly to the quantity of domestic beef available to satisfy the requirement.<sup>473</sup> The Reference Price requirement also limits imports by prohibiting imports during certain periods and forcing additional caution on beef importers. That is, if there is even a chance that the price of secondary cuts of beef will fall below the Reference Price during an import period, importers likely would reduce the quantity of beef they applied to import during that period, or refrain from applying to import beef altogether.<sup>474</sup>

323. All these factors together lead importers to reduce, sometimes dramatically, the quantities of imports they request to import at the start of each validity period. And, of course, once an import period starts, imports are limited to the types and quantities specified on outstanding Recommendations and Import Approvals, so importers cannot take advantage of any unexpected competitive opportunities for imported products even should they arise.

324. Indonesia’s import licensing regime further limits importation by imposing additional, non-business costs on imports. The quantity, type, country of origin, and port of entry requirements impose additional costs on importers by depriving them of the ability to make rational decisions to reduce costs or increase revenue once an import approval validity period has begun.<sup>475</sup> Importers may not substitute products of a different type, country of origin, or point of entry for those specified on their Recommendation and Import Approval, even if not doing so imposes significant costs due to unforeseen developments, such as natural disasters, labor strikes,

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<sup>470</sup> MOT 46/2013, as amended, article 12(2) (JE-21); MOA 139/2014, as amended, article 33(a) (JE-28).

<sup>471</sup> *See supra* sec. IV.D.4.

<sup>472</sup> *See supra* sec. IV.D.5.

<sup>473</sup> *See supra* sec. IV.D.6.

<sup>474</sup> *See supra* sec. IV.D.7.

<sup>475</sup> *See supra* sec. IV.D.3.

or shifts in supply or demand in different markets. The domestic purchase requirement also adds unnecessarily to the costs of imports by requiring importers to purchase local beef as a condition of being able to import. As discussed, local beef is in very short supply and the cost of compliance with this requirement therefore has risen considerably.<sup>476</sup>

325. Indonesia’s import licensing regime has, in fact, been designed to reduce imports of animals and animal products. As described above, Agriculture Minister Suswono explained in 2012 that the ministry would use the import licensing regime to decrease Indonesia’s meat imports by ensuring that imports did not exceed 20 percent of total demand, or a volume of 85,000 tons.<sup>477</sup> In the next year, he explained that, leading up to 2014 (the government’s deadline for self-sufficiency in beef), “beef imports will gradually be decreased and import restrictions will be tightened.”<sup>478</sup>

326. Thus, Indonesia’s import licensing regime for animals and animal products serves as a limitation or limiting condition on importation, or has a limiting effect on importation. And due to the way the requirements of the regime interact with and reinforce each other, the limitations or limiting effect of the regime as a whole on importation is greater than the sum of its individual components. The Indonesian regime is a “restriction” within the meaning of Article XI:1, and Indonesia breaches Article XI:1 by instituting or maintaining it.

**E. Indonesia’s Import Licensing Regime for Animals and Animal Products Is Inconsistent with Indonesia’s Obligations Under Article 4.2 of the Agreement on Agriculture**

327. Indonesia’s import licensing regime for animals and animal products and its constituent prohibitions or restrictions are “measures of the kind which have been required to be converted into ordinary customs duties” within the meaning of Article 4.2 of the Agriculture Agreement. Footnote 1 to Article 4.2 provides that such measures include, *inter alia*, “quantitative import restrictions,” “minimum import prices,” and “similar border measures” other than ordinary customs duties. Where a measure constitutes a “prohibition or restriction” (other than duties, taxes or other charges) in breach of Article XI, that measure also would run afoul of the prohibition in Article 4.2 on Members maintaining agricultural measures of the kind listed in Footnote 1. The United States considers that Indonesia’s import licensing regime for animals and animal products – as a whole and in its constituent parts – breaches Article 4.2 for the same reasons that it breaches GATT 1994 Article XI:1. As explained in section III.A.2 above, when a measure concerning agricultural products has been found inconsistent with Article XI:1 of the

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<sup>476</sup> See *supra* sec. III.B.3.7; IV.D.6.

<sup>477</sup> “Meat Imports Tightened,” *AgroFarm*, (Exh. US-11); see also Lubis, “Failure of Self-Sufficiency Program in Sight” (Exh. US-7) (stating that, in 2012, the Ministry cut import permits for live cattle by 30% and for beef meat by almost 60%, although it had to import an additional 7,000 tons of beef mid-year in response to spiking food prices).

<sup>478</sup> Ministry of Agriculture, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” (Exh. US-10).

GATT 1994, panels have found that the measure would also be inconsistent with Article 4.2 of the Agriculture Agreement.<sup>479</sup>

328. The United States recalls that, as mentioned above, the Agreement on Agriculture applies to the products listed in Annex 1 to that Agreement, which include products listed under HS Chapters 1 to 24. The animals and animal products covered by Indonesia’s import licensing regime fall within these HS Chapters, and thus are covered by the Agreement on Agriculture.<sup>480</sup>

329. In this dispute, the United States has demonstrated that Indonesia’s import licensing regime imposes seven distinct prohibitions and restrictions on importation that are inconsistent with Article XI:1 of the GATT 1994. The United States also has shown that the regime as a whole is inconsistent with Article XI:1. Therefore, the prohibitions and restrictions imposed by Indonesia’s import licensing regime, and the regime as a whole, also are inconsistent with Article 4.2 of the Agreement on Agriculture. Specifically, the “prohibitions” and “restrictions” imposed by Indonesia’s licensing regime also constitute “quantitative import restrictions” or “similar border measures”, or “minimum import prices” or “similar border measures,” within the meaning of footnote 1 to Article 4.2.

**1. The Prohibition on the Importation of Animals and Animal Products Not Listed in Indonesia’ Regulations Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

330. The United States has already demonstrated that Indonesia’s use of its import licensing regime to ban the importation of animals and animal products not listed in the appendices of both MOT 46/2013 and MOA 139/2014 is a “prohibition” inconsistent with Article XI:1 of the GATT 1994.<sup>481</sup> For the same reasons, it is also a “quantitative import restriction” inconsistent with Article 4.2 of the Agreement on Agriculture.

331. As discussed in more detail above, the term “quantitative import restriction” in Article 4.2 may encompass a number of restrictions which operate in relation to or through quantities, or have the capacity to affect quantities of imports.<sup>482</sup>

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<sup>479</sup> See *India – Quantitative Restrictions (Panel)*, paras. 5.238-242; *Korea – Beef (Panel)*, para. 768 (“Since the panel has already reached the conclusion that the above measures are inconsistent with Article XI and the Ad Note to Articles XI, XII, XIII, XIV, and XVIII relating to state-trading enterprises, the same measures are necessarily inconsistent with Article 4.2 of the *Agreement on Agriculture* and its footnote referring to non-tariff measures maintained through state-trading enterprises”); see also *EC – Seal Products (Panel)*, para. 7.665 (rejecting Norway’s challenge to the EU seal regime under Article 4.2 on the ground that the panel had already rejected essentially the same challenge under Article XI:1 of the GATT 1994).

<sup>480</sup> See Indonesia, Applied MFN Tariff Schedule: Live Animals, Meat and Edible Meat Offal (2014), *WTO Tariff Download Facility*, (Exh. US-39).

<sup>481</sup> See *supra* sec. IV.D.1.

<sup>482</sup> See *supra* sec. IV.C.1.

332. The panel in *India – Quantitative Restrictions* reasoned that, just as a measure prohibiting the importation of certain products is a “restriction” under Article XI:1, so it is a “quantitative restriction” within the scope of, and inconsistent with, Article 4.2 of the Agriculture Agreement. That panel considered a measure under which some products were designated for “canalization” and under which no import licenses were granted for those products except to the designated state trading agency.<sup>483</sup> The panel found that this restriction was inconsistent with Article XI:1, based in part on evidence that, for many products, there had been zero importation through the state trading entity,<sup>484</sup> such that they effectively were banned. The panel went on to examine the measure under Article 4.2 of the Agreement on Agriculture and explained that the “legal status of India’s import restrictions under the Agreement on Agriculture is . . . identical to that under GATT 1994.”<sup>485</sup> Having found that the restrictions were inconsistent with the GATT 1994, therefore, the panel concluded that the measure breached Article 4.2 of the Agreement on Agriculture based on its inconsistency with the GATT 1994.<sup>486</sup>

333. Similarly, the panel in *US – Poultry (China)*, considered a measure that “operate[d] as a prohibition on the importation of poultry products from China into the United States.”<sup>487</sup> Having found that the measure was inconsistent with Article XI:1 of the GATT 1994, the panel exercised judicial economy with respect to China’s Article 4.2 claim, reasoning that, “in making findings under Article XI:1 of the GATT 1994, the Panel considers that it has effectively resolved the aspects in this dispute related to the ‘restrictions’ on Chinese poultry and poultry products into the United States.”<sup>488</sup>

334. As described above, Indonesia’s positive list for import-eligible products bans the importation of certain products, namely, those not appearing on the lists in Appendices I and II of MOT 46/2013 and MOA 139/2014. A ban on importation limits the quantity permitted to be imported to zero. Such a ban constitutes a prohibition in breach of Article XI:1 of the GATT 1994. For the same reason, Indonesia’s prohibition on the importation of unlisted animals and animal products also constitutes a “quantitative import restriction” for purposes of Footnote 1 to Article 4.2 of the Agriculture Agreement, and therefore breaches this provision as well.

## **2. The Application Windows and Validity Periods Constitute a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

335. As demonstrated in Section IV.D.2 above, Indonesia’s application window and validity period requirements are a “restriction” inconsistent with Article XI:1 of the GATT 1994.<sup>489</sup> For

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<sup>483</sup> *India – Quantitative Restrictions (Panel)*, paras. 3.24, 5.135.

<sup>484</sup> *India – Quantitative Restrictions (Panel)*, paras. 5.135-136.

<sup>485</sup> *India – Quantitative Restrictions (Panel)*, para. 5.239.

<sup>486</sup> *India – Quantitative Restrictions (Panel)*, para. 5.241-5.242.

<sup>487</sup> *US – Poultry (China)*, para. 7.485.

<sup>488</sup> *US – Poultry (China)*, para. 7.486.

<sup>489</sup> *See supra* sec. IV.D.2.

similar reasons, these requirements are also inconsistent with Article 4.2 of the Agreement on Agriculture because they are a “quantitative import restriction” or “similar border measure.”

336. As described above, animals and animal products imported into Indonesia during any import approval validity period must be shipped, arrive, and clear customs within that validity period – i.e., products cannot be shipped until after Import Approvals are issued for that period and must clear customs before the validity period ends. For U.S. exporters, this means shipments must stop four to six weeks prior to the end of a validity period to ensure that goods arrive and clear customs during that period. At the same time, exporters cannot start shipping for the next validity period, because, as discussed, importers must have the next period’s Import Approval numbers in order to do so, which they will not receive until the beginning of that period.<sup>490</sup> Consequently, there are four to six weeks of each period, and therefore four to six months out of every year, when U.S. products are effectively blocked from access to the Indonesian market.

337. By creating periods of time when importation will not occur, the application window and import approval validity requirements effectively limit the quantity permitted to be imported during those periods to zero. The panel in *Turkey – Rice* considered a measure that was similar in that it allowed imports for a certain level and period of time and effectively banned additional importation. The measure at issue was Turkey’s failure to grant during certain “periods of time” the permits that Turkey required for imports of rice outside Turkey’s tariff rate quota (“TRQ”), effectively blocking such imports.<sup>491</sup> The panel found that the measure was a “quantitative import restriction” under Article 4.2 of the Agriculture Agreement on the grounds that, even without “any systematic intention to restrict the importation of rice at a certain level,” the measure was “liable to restrict the volume of imports.”<sup>492</sup>

338. Similarly, the application window and validity period requirements permit importation only during the period after permits have been obtained and for which the permits pertain, but do not permit an importer to obtain permits for the subsequent time period until a limited window prior to that period. The combined effect of these requirements precludes uninterrupted imports from markets beyond a certain distance and means that U.S. animals and animal products are precluded from importation into the Indonesia market for a total of one third to one half of every year. Thus, the requirements effectively limit the quantity permitted to be imported during those periods to zero. As the requirements are inconsistent with Article XI:1 of the GATT 1994, Indonesia’s application window and validity period requirements also constitute quantitative import restrictions or similar measures in breach of Article 4.2 of the Agreement on Agriculture.

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<sup>490</sup> See *supra* sec. III.B.3.b.

<sup>491</sup> *Turkey – Rice*, para. 7.118.

<sup>492</sup> *Turkey – Rice*, paras. 7.121-122.

**3. Restricting Imports of Animals and Animal Products During a Validity Period to Those of the Type, Quantity, Country of Origin, and Port of Entry Listed on the Original Import Documents for That Period Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

339. The United States has demonstrated that Indonesia’s limitation on imports of animals and animal products during any import approval validity period to products of the type, quantity, country of origin, and port of entry listed on the original permits issues at the beginning of the import period is a “restriction” inconsistent with Article XI:1.<sup>493</sup> For the same reasons, the type, quantity, country or origin, and port of entry requirements impose a “quantitative import restriction” or “similar border measure” inconsistent with Article 4.2 of the Agriculture Agreement.

340. Indonesia’s type, quantity, country of origin, and port of entry requirements restrict imports because, during any import approval validity period, the only animals and animal products that can be imported are those that conform to the products listed on importers’ original Recommendations and Import Approvals issued at the beginning of that period. Moreover, importers cannot change the specifications on their import permits or apply for new permits once the import period has begun.<sup>494</sup> Thus, once a period begins, importers cannot make changes to the products, based on market developments or other circumstances, in order to take advantage of unforeseen opportunities (e.g., to import a greater quantity of a product based on a spike in demand, or to import a different product based on high demand or an excess supply of that product) or to mitigate losses.

341. The *Turkey – Rice* panel found that Turkey’s “denial, or failure to grant, licenses to import rice outside of the tariff rate quota” was “a quantitative import restriction, within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture” because it had “restricted the importation of rice for periods of time.”<sup>495</sup> Indonesia’s type, quantity, country of origin, and port of entry requirements are a “quantitative import restriction” or “similar border measure” for similar reasons. As described above, importers are prohibited from engaging in importation not falling within the specifications established in its original import permits, and importers cannot request new or revised permits after the import period has begun to allow them to import a greater quantity of products or any products of a different type, country of origin, or port of entry as those listed on their Recommendation and Import Approval for that period. Thus, the requirements effectively limit the quantity permitted to be imported other than as set out on the Recommendations and Import Approvals to zero.

342. Based on the foregoing, and for the same reasons they breach Article XI:1 of the GATT 1994, Indonesia’s type, quantity, country of origin, and port of entry requirements fall within the

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<sup>493</sup> See *supra* sec. IV.D.3.a.

<sup>494</sup> MOA 139/2014 as amended, article 23(1) (JE-28); *id.* article 26; *id.*, article 33(a); MOT 46/2013, as amended, article 12(1) (JE-21).

<sup>495</sup> *Turkey – Rice*, paras. 7.51, 7.117 and 7.121.

scope of footnote 1 to Article 4.2 of the Agreement on Agriculture, and therefore breach that provision.

#### **4. The Realization Requirement Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

343. The United States demonstrated in Section IV.D.4 above that the realization requirement – the requirement that each importer of Appendix I products import at least 80 percent of the products listed on its Import Approval for the preceding year or become ineligible for future import permits – is a restriction inconsistent with GATT Article XI:1.<sup>496</sup> For similar reasons, the realization requirement is a “quantitative import restriction” or a “similar border measure” within the meaning of Article 4.2 of the Agriculture Agreement.

344. Indonesia’s 80 percent realization requirement has the effect of restricting the volume of imports an importer would otherwise choose to import based on commercial considerations. As described above, to meet the 80 percent requirement, an importer would choose to request approval for an amount it would comfortably realize, even if this amount is less than what it considers it could profitably import during the relevant period. Indonesia requires importers to submit monthly reports demonstrating their importation of the products listed in their import permits. If they do not fulfill these reporting requirements, or if at the end of the year they cannot show that they have imported at least 80 percent of the relevant products, they will be sanctioned and may lose the ability to import in the future. Therefore, importers that have not imported sufficient product at the end of each period must either increase importation even if this is not commercially feasible, or face losing their eligibility to import. The potential surge in imports at the end of each period, and particularly at the end of the year, also creates risks of over-supply, which can cause prices to drop and importers to have to sell at a loss in order to remain eligible for future permits.<sup>497</sup> Importers are therefore more conservative than they otherwise would be in their Import Approval applications, limiting the quantity of products they apply for permission to import and thus the amount actually imported.

345. In analyzing Turkey’s failure to grant licenses for imports entering outside of Turkey TRQ, the panel in *Turkey – Rice* found reasoned that “[e]ven without any systematic intention to restrict the importation of rice at a certain level, the lack of transparency and predictability of Turkey’s issuance of Certificates of Control to import rice is similarly liable to restrict the volume of imports.”<sup>498</sup> Indonesia’s 80 percent realization requirement similarly has the effect of restricting the volume of imports.

346. As described above, Indonesia requires importers to submit monthly reports demonstrating their importation of the products listed in their import permits. If they do not fulfill these reporting requirements, or if at the end of the year they cannot show that they have imported at least 80 percent of the relevant products, they will be sanctioned and may lose the

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<sup>496</sup> See *supra* sec. IV.D.4.

<sup>497</sup> See *supra* paras. 171-174.

<sup>498</sup> *Turkey – Rice (Panel)*, para. 7.120.

ability to import in the future. Consequently, importers that have not imported sufficient product at the end of each period must either increase importation even if this is not commercially feasible, or face losing their eligibility to import. Importers thus have a strong incentive to ensure that they do not apply for and obtain Import Approvals covering greater quantities of products than they are certain they can profitably import. Importers are therefore more conservative than they otherwise would be in their Import Approval applications, limiting the quantity of products they apply for permission to import.

347. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, the 80 percent realization requirement restricts the volume of animals and animal products imported into Indonesia, and thus constitutes a “quantitative import restriction” or “similar border measure” in breach of Article 4.2.

**5. The Restriction on the Importation of Animals and Animal Products Other Than for Certain Limited Purposes Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

348. The United States demonstrated above that Indonesia’s use requirements for imported animals and animal products – prohibiting the importation of animals, beef products, and other animal products except for certain specific purposes – are inconsistent with Article XI:1 of the GATT 1994.<sup>499</sup> These requirements are also inconsistent with Article 4.2 of the Agreement on Agriculture because they are “quantitative import restrictions” or “similar measures” within the meaning of Article 4.2.

349. As shown in Section IV.D.5.a, Indonesia prohibits (1) the importation of animals except for purposes of research, overcoming domestic shortfalls, and improving genetic diversity; (2) the importation of beef meat for retail sale; and (3) the importation of other animal products for sale in traditional Indonesian markets.<sup>500</sup> Consequently, imports of certain animals and animal products are denied access to the Indonesia’s retail market altogether, while imports of other animal products are denied access to a substantial portion of the Indonesian market for such products.<sup>501</sup> Thus the use requirements restrict the quantity of imports by limiting their access to only certain segments of the Indonesian market, as overall demand for those products would be greater, were they able to access the entire Indonesian market.

350. The panel in *India – Quantitative Restrictions* also considered an import licensing regime that included such a use restriction, specifically, a requirement that goods could be imported only by their “actual user.” The panel found that the “actual user” requirement was a “restriction” inconsistent with Article XI:1 because it “preclude[d] imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own

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<sup>499</sup> See *supra* sec. IV.D.5.

<sup>500</sup> See *supra* sec. IV.D.5.

<sup>501</sup> See *supra* para. sec. IV.D.5; Rangkuti & Wright, *GAIN Report No. ID1450: Retail Foods 2014*, at 5-6 (Exh. US-499).

immediate use is restricted.”<sup>502</sup> Finding that the legal status of India’s import licensing regime, including the “actual user” requirement, was identical under both the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the panel went on to find that the restriction was inconsistent with Article 4.2 as well.<sup>503</sup>

351. Based on the foregoing, and for the same reasons they breach Article XI:1 of the GATT 1994, Indonesia’s use requirements are “quantitative import restrictions” or “similar border measures” inconsistent with Article 4.2 of the Agreement on Agriculture.

**6. The Domestic Purchase Requirement Constitutes a Quantitative Import Restriction or a Similar Border Measure Inconsistent with Article 4.2**

352. The United States has already shown that Indonesia’s domestic purchase requirement for importers of beef meat – that is, the requirement that beef importers “absorb”, or purchase, local beef equivalent to three percent of the quantity they import – is a “restriction” inconsistent with GATT 1994 Article XI:1.<sup>504</sup> Similarly, the requirement is a “quantitative import restriction” or “similar border measure” within the meaning of Article 4.2 of the Agriculture Agreement.

353. As described above, the domestic purchase requirement restricts beef imports in several ways. First, the requirement limits imports by seeking to force the substitution of domestic products for imports. Second, the requirement imposes a further direct limit on imports by linking the quantity of beef that can be imported to the quantity of local beef that can be purchased and counted toward the domestic purchase requirement. This restriction is aggravated by the shortage of local beef, which makes it difficult for importers to identify sufficient local beef to support the quantity of imports they would otherwise choose to import. Third, the requirement limits imports by imposing significant non-market based costs (i.e., the purchase of expensive local beef) on importation.<sup>505</sup>

354. Indonesia’s domestic purchase requirement thus restricts the volumes and distorts the prices of imported animals and animal products by displacing some volume of imports with domestic purchases and increasing costs associated with importing beef. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, Indonesia’s absorption requirement is a “quantitative import restriction” or “similar border measure” inconsistent with Article 4.2 of the Agreement on Agriculture.

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<sup>502</sup> *India – Quantitative Restrictions*, para 5.142.

<sup>503</sup> *India – Quantitative Restrictions*, paras. 5.143, 5.239, 5.242.

<sup>504</sup> *See supra* sec. IV.D.7.

<sup>505</sup> *See supra* sec. IV.D.7; *see also* Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40); Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry,” *Reuters* (Exh. US-8).

## **7. The Reference Price Requirement Constitutes a Minimum Import Price or Similar Border Measure Inconsistent with Article 4.2**

355. As shown in Section IV.D.7 above, Indonesia’s Reference Price requirement for the products listed in Appendix I to MOA 139/2014 and MOT 86/2013 (i.e. cattle and beef meat) is a “restriction” inconsistent with Article XI:1 of the GATT 1994.<sup>506</sup> This requirement is also inconsistent with Article 4.2 of the Agreement on Agriculture because it constitutes a “minimum import price” or “similar border measure” within the meaning of footnote 1 to that article. The Appellate Body in *Chile – Price Band System* explained that the term “minimum import price,” under Article 4.2, “refers generally to the lowest price at which imports of a certain product may enter a Member’s domestic market.”<sup>507</sup>

356. Indonesia’s Reference Price requirement conditions the importation of cattle and beef on the market price of secondary cuts of beef in Indonesia remaining above a certain level.<sup>508</sup> If the market price of secondary cuts of beef falls below the predetermined Reference Price, all imports of cattle and beef are prohibited. This requirement effectively operates as a minimum import price for secondary cuts of beef because importers cannot sell below this price without lowering the market price, which may result in the market price also falling below the Reference Price. The Reference Price would, thus, constitute a minimum import price for secondary cuts of beef.

357. The Reference Price, aside from being an effective minimum import price, also constitutes a “similar border measure” within the meaning of footnote 1 to Article 4.2. The Appellate Body in *Peru-Agriculture Products* recently stated that, for purposes of Article 4.2 footnote 1, “similarity” to minimum import price entails a measure sharing “sufficient number of characteristics with, and [having] a design, structure, operation and impact similar, to a minimum import price.”<sup>509</sup> As discussed above, the Reference Price establishes a price point below which beef imports are not allowed to enter the Indonesian market. It is, therefore, “similar” to a minimum import price. Further, like a minimum import price, it would have the effect of impeding lower imported prices from the Indonesia market by banning foreign beef imports.

358. Based on the foregoing, and for the same reasons it breaches Article XI:1 of the GATT 1994, Indonesia’s Reference Price requirement is a “minimum import price” or “similar border measure” inconsistent with Article 4.2 of the Agreement on Agriculture.

## **8. Indonesia’s Import Licensing Regime for Animals and Animal Products, As a Whole, Constitutes a Quantitative Import Restriction or Similar Border Measure Inconsistent with Article 4.2**

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<sup>506</sup> See *supra* sec. IV.D.5.a.

<sup>507</sup> *Chile – Price Band System (AB)*, para. 236; see *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 7.30.

<sup>508</sup> See *supra* sec. III.B.3.f.

<sup>509</sup> *Peru – Agricultural Products*, para. 5.144 (*Quoting Chile – Price Band System (AB)*, para. 193.)

359. The United States showed previously that, in addition to imposing prohibitions and restrictions on importation within the meaning of Article XI:1 of the GATT 1994, Indonesia’s import licensing regime for animals and animal products operating as a whole is also inconsistent with that provision.<sup>510</sup> For the same reasons, Indonesia’s import licensing regime for animals and animal products as a whole is also inconsistent with Article 4.2 of the Agreement on Agriculture.

360. Operating as a whole, Indonesia’s import licensing regime constitutes a “quantitative restriction” within the meaning of footnote 1 to Article 4.2. Through its interdependent requirements concerning RI designations, Recommendations, and Import Approvals, the regime imposes explicit and implicit quantitative restrictions on imports.

361. As described in Section IV.D.8 above, the importation of some products is prohibited altogether. For products whose importation is permitted, applications are only accepted during short windows of time, and are not issued prior to the start of the relevant validity period. No orders or shipments can be made until these permits are received, and Indonesia’s quantity, type, country of origin, and port of entry requirements strictly limit imports to those covered by the original Recommendations and Import Approvals as issued at the beginning of the relevant period. Imports not meeting those specification are prohibited.

362. Other requirements exacerbate the restrictive effect of these aspects of Indonesia’s import licensing regime.<sup>511</sup> The 80 percent requirement causes importers to self-restrict the quantity of products they apply for permission to import, thereby limiting the quantity they are allowed to import. The use restrictions limit the commercial opportunities available to imports and thus further restrict import quantities. The domestic purchase requirement restricts the quantity of imports by forcing import substitution, imposing unnecessary costs on imports, and tying the quantity of permitted imports to the availability of domestic beef. Finally, the Reference Price also restricts the commercial opportunities available to imports and increases risk and uncertainty, which itself has a limiting effect on imports.

363. The Appellate Body’s description in *Chile – Price Bands System* of the essential elements of the measures enumerated in footnote 1 to Article 4.2 supports a finding that the import licensing regime is inconsistent with that article. The Appellate Body stated:

[W]e note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market.<sup>512</sup>

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<sup>510</sup> See *supra* sec. IV.D.8.

<sup>511</sup> See *supra* sec. IV.D.8.

<sup>512</sup> *Chile – Price Band System (AB)*, para. 227.

364. Indonesia’s import licensing regime does all of these things. Indonesia’s regime restricts the volume of imports of animals and animal products, prohibiting some products altogether and restricting others in the various ways described above. Moreover, by effectively setting a minimum import price, and by artificially shrinking the supply of imports and increasing demand for domestic products through the domestic purchase requirement, the regime has caused the price of meat in Indonesia, particularly beef, to rise well above world beef prices.<sup>513</sup> For all of these reasons, and for the same reasons it breaches Article XI:1 of the GATT 1994, the import licensing regime as a whole constitutes a “quantitative import restriction” or “similar border measure” in breach of Article 4.2 of the Agreement on Agriculture.

**F. Indonesia’s Restriction on Imports Based on the “Insufficiency” of Domestic Production Is Inconsistent with Indonesia’s Obligations under Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture**

**1. Inconsistency with Article XI:1 of the GATT 1994**

365. Indonesia permits imports of horticultural products and animals and animal products only when, and to the extent that, domestic supply of those products is deemed insufficient to meet Indonesians’ basic needs. Otherwise, imports are prohibited. This conditioning of imports on the insufficiency of domestic supply is inconsistent with Article XI:1 of the GATT 1994 because it is a “restriction” on imports within the meaning of Article XI:1 and, therefore, is inconsistent with GATT 1994 Article XI:1.<sup>514</sup>

*a. The Domestic Insufficiency Condition Is a “Restriction” Within the Meaning of Article XI:1*

366. A measure is a “restriction” under Article XI:1 if it is a limitation or limiting condition on importation, or has limiting effects on importation.<sup>515</sup> Indonesia’s domestic insufficiency requirement explicitly places a limiting condition on imports by conditioning all importation of horticultural products and animals and animal products on the insufficiency of domestic products to meet Indonesian consumers’ needs. The requirement thus severely limits the opportunities for importation, in that imported products are given market access only if, and to the extent that, domestic supply is deemed insufficient to satisfy domestic needs.

367. Accordingly, the domestic insufficiency condition is a limitation or limiting condition on importation, or has a limiting effect on importation, and thus is a “restriction” within the meaning of Article XI:1. During those periods in which Indonesia considers that domestic supply *is* sufficient, and therefore imports are not permitted, the domestic insufficiency condition would also constitute a “prohibition” within the meaning of Article XI:1.

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<sup>513</sup> See Wright, *GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40); see Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry,” *Reuters* (Exh. US-8).

<sup>514</sup> This requirement is not a duty, tax, or other charge, and, therefore, is within the scope of Article XI:1.

<sup>515</sup> See *supra* sec. III.A.1; *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 320.

368. As described above, Indonesia’s domestic insufficiency condition is set out in four laws – the Horticulture Law, the Farmers’ Law, the Animal Law, and the Food Law.<sup>516</sup> Individually and collectively, these laws provide that importation of horticultural products and animals and animal products is permitted only if domestic production of those products is deemed by the government not sufficient to fulfill the needs of Indonesian consumers.<sup>517</sup> Indonesian officials have confirmed that imports are permitted only in light of insufficiencies in domestic supply, explaining that “[i]mports are only for covering domestic shortfalls”<sup>518</sup> and that “the principle of import [is] only to fill the need that is not available in the country.”<sup>519</sup>

369. The domestic insufficiency condition is, to a great extent, the policy objective behind Indonesia’s import licensing regimes for horticultural products and for animals and animal products and, therefore is implemented by these regimes.<sup>520</sup> The United States considers that, as applied through the import licensing regimes, the domestic insufficiency condition set out in the Horticulture Law, the Farmers’ Law, the Animal Law, and the Food Law is inconsistent with Article XI:1. However, the United States also considers that the domestic sufficiency condition, considered by itself, constitutes an restriction within the meaning of Article XI:1.

370. First, the domestic sufficiency requirement places a limiting condition on importation in that imports are allowed only on the condition that domestic production is deemed by the government not “sufficient” to fulfill domestic demand. Otherwise, importation is prohibited. If importation is permitted, the domestic sufficiency requirement still places a limitation on importation, as it is allowed only to the extent of the “domestic shortfall”<sup>521</sup> that the Indonesian Government identified. The restriction also has a limiting effect on trade to the extent that the Indonesian market would, in the absence of the restriction, import more products than the quantity that the government deemed to be the domestic shortfall.

371. In 2015, for example, the Indonesian Government dramatically reduced imports of live cattle in the second quarter in an effort to protect the domestic cattle producers and promote self-

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<sup>516</sup> See *supra* paras. 12-15, 82-82.

<sup>517</sup> See Horticulture Law, article 33(1)-(2) (JE-1) (stating that horticultural business in Indonesia “shall be carried out by giving priority to the use of domestic horticultural means” and that “[i]n case domestic horticultural means are not sufficient or available, horticultural means originating from abroad may be used”); Farmers Law, article 30 (JE-3) (stating that “Every person is prohibited from importing Agricultural Commodities when the availability of domestic Agricultural Commodities is sufficient”); Animal Law (JE-4) (Import of animals or cattle and animal products from foreign countries shall be done if local production and supply of animals or cattle and animal products is not sufficient to fulfill consumption needs of the society”); Food Law, article 36 (JE-2) (stating that “Import of Food can only be done if the domestic Food Production is insufficient” and/or if products are not “produced domestically”).

<sup>518</sup> Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” (Exh. US-10).

<sup>519</sup> Gusmiati, “Ministry of Agriculture: Horticulture Imports Not Prohibited But Regulated,” *Berita 2 Bahasa* (Exh. US-14).

<sup>520</sup> See *supra*, paras 12-19, 82-84.

<sup>521</sup> Ministry of Industry, “Minister of Agriculture: Agricultural Imports Will Be Tightened,” (Exh. US-10).

sufficiency.<sup>522</sup> In response to supply shortages and sharply rising prices, the Government later agreed to allow BULOG to import an additional 50,000 head of cattle in the third quarter in what the press described as a “tacit acknowledgement that its bid for food self-sufficiency has backfired, driving the price of beef skyward and leaving traders and consumers feeling the pinch.”<sup>523</sup> Thus, the market access of imports was restricted, as imports were permitted only to the extent that the government deemed domestic supply to be insufficient.

372. The lack of transparency and predictability in the implementation of the domestic insufficiency requirement itself has a limiting effect on imports. The Government does not announce how or when the sufficiency of domestic production to satisfy Indonesian consumers’ needs will be determined or how the degree of the shortfall (if any) will be calculated. As a result, importers are unable to anticipate whether and when imports of a particular product will be prohibited because domestic production is deemed sufficient, or what level of imports will be permitted to make up for a shortfall in domestic production.

373. Previous panels have confirmed that measures that limit the market access and competitive opportunities of imported products are “restrictions” under Article XI:1. The panel in *Argentina – Import Measures*, for example, considered a measure that, *inter alia*, required companies to reduce their imports in order to protect domestic producers.<sup>524</sup> The panel found that the “import reduction requirement involve[d] *per se* a limitation on imports.”<sup>525</sup> The panel also noted that companies did not know when a restriction would be imposed and that the “uncertainty” generated by Argentina’s measure was “an additional and significant element in limiting imports.”<sup>526</sup> The panel explained:

This uncertainty creates additional negative effects on imports, for it negatively impacts business plans of economic operators who cannot count on a stable environment in which to import and who accordingly reduce their expectations as well as their planned imports into the Argentine market.<sup>527</sup>

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<sup>522</sup> See “Market Fundamentals Force Government’s Hand in Beef Brouhaha,” *Jakarta Globe* (Exh. US-59); Shalailah Medhora, “Indonesia’s 80% Cut in Cattle Imports Takes Australian Industry by Surprise,” *The Guardian*, July 13, 2015, <http://www.theguardian.com/australia-news/2015/jul/14/indonesias-80-cut-in-cattle-imports-takes-australian-industry-by-surprise> (Exh. US-60).

<sup>523</sup> “Market Fundamentals Force Government’s Hand in Beef Brouhaha,” *Jakarta Globe* (Exh. US-59); see Tom Allard, “Indonesia Increases Cattle Permits Amid Soaring Beef Prices,” *Sydney Morning Herald*, Aug. 11, 2015, <http://www.smh.com.au/national/indonesia-prepares-to-increase-cattle-permits-amid-soaring-beef-prices-20150810-giw1xp.html> (Exh. US-61).

<sup>524</sup> *Argentina – Import Measures (Panel)*, para. 6.255.

<sup>525</sup> *Argentina – Import Measures (Panel)*, para. 6.257.

<sup>526</sup> *Argentina – Import Measures (Panel)*, para. 6.260.

<sup>527</sup> *Argentina – Import Measures (Panel)*, para. 6.260.

Similarly, Indonesia’s domestic insufficiency condition imposes an explicit limitation of limiting condition on importation, which is exacerbated by the lack of predictability and transparency in how the requirement is administered.

374. Because the domestic insufficiency condition limits market access directly by placing a limiting condition on importation and limiting import volumes, and has further limiting effects by creating uncertainty as to whether, and at what levels, imports will be permitted at any given time, the requirement is a “restriction” within the meaning of Article XI:1. Accordingly, Indonesia breaches Article XI:1 by instituting or maintaining this requirement.

## 2. Inconsistency with Article 4.2 of the Agreement on Agriculture

375. The section above describes how the legislative provisions conditioning importation on the insufficiency of domestic production to satisfy Indonesian consumers’ needs are inconsistent with Article XI:1 of the GATT 1994. For similar reasons, these provisions are also inconsistent with Article 4.2 of the Agreement on Agriculture because they operate as a “quantitative import restriction” within the meaning of footnote 1 to Article 4.2.

376. First, the domestic insufficiency provisions constitute an explicit quantitative limit on imports, in that they limit imports to whatever quantity is deemed necessary to satisfy Indonesians’ needs, over and above the amount produced by domestic producers. If domestic production of a particular product is deemed sufficient, no imports are permitted. If domestic production is not deemed sufficient, imports are permitted only to make up what the government considers to be the “shortfall” between domestic production and consumers’ needs. These restrictions are, on their face, “quantitative.”

377. The panel report in *Turkey – Rice* addressed Turkey’s failure to grant necessary import permits for rice outside of Turkey’s TRQ, effectively blocking such imports.<sup>528</sup> The panel found that the measure was a quantitative restriction within the meaning of footnote 1 to Article 4.2 of the Agriculture Agreement and, therefore, inconsistent with that provision, because “[t]hrough this practice, the Turkish authorities have restricted the importation of rice for periods of time.”<sup>529</sup>

378. Further, the lack of transparency and predictability in the operation of the domestic insufficiency condition also has a negative impact on the competitive opportunities of imports of horticultural products and animals and animal products. There is no explanation in Indonesia’s laws or regulations of how the government determines the sufficiency or insufficiency of domestic production or, where domestic production is deemed insufficient, the extent of the “shortfall,” and, consequently, the volume of imports to be permitted. It is clear, however, that these determinations inform the operation of Indonesia’s import licensing regimes for horticultural products and animals and animal products.

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<sup>528</sup> *Turkey – Rice*, para. 7.118.

<sup>529</sup> *Turkey – Rice*, para. 7.121.

379. Similarly to the measure faulted in *Chile – Price Band System*,<sup>530</sup> the lack of transparency and predictability caused by the domestic insufficiency condition is liable to restrict imports and to prevent transmission of the global price for beef into the Indonesian market, as indeed is already occurring.<sup>531</sup>

380. For all of these reasons, and for the same reasons they breach Article XI:1 of the GATT 1994, the legislative provisions imposing the domestic insufficiency condition on imports are “quantitative import restrictions” or “similar border measures” in breach of Article 4.2 of the Agriculture Agreement.

### **G. Indonesia’s Limited Application Windows and Validity Periods Are Inconsistent with Indonesia’s Obligations under the Import Licensing Agreement**

381. For the reasons set out in in Sections IV.B.1, IV.C.1, IV.D.2, and IV.E.2 above, the United States submits that the limited application windows and validity periods for RIPHs and Import Approvals, for horticultural products, and for Recommendations and Import Approvals, for animals and animal products,<sup>532</sup> are inconsistent with Article XI:1 of the GATT 1994 and with Article 4.2 of the Agreement on Agriculture. Having made these findings, it would not be necessary for the Panel to go on to examine the U.S. claims in relation to the limited application windows and validity periods under the *Agreement on Import Licensing Procedures* (“Import Licensing Agreement”).

382. These two restrictions derive from requirements that are, in a sense, procedural in nature; but the U.S. challenge is directed against the substantive restriction imposed by the application window and validity period rules, rather than any procedural aspect of the licensing requirements. Consequently, the United States considers that, for purposes of resolving this dispute between the parties, the application window and validity period requirements are appropriately examined under Article XI:1 of the GATT 1994.<sup>533</sup>

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<sup>530</sup> *Chile – Price Band System (AB)*, para. 234; *see also id.*, para. 261 (noting that Chile’s system “creates intransparent and unpredictable market access conditions” and has “the effect of disconnecting Chile’s market from international price development in a way that insulates Chile’s market from the transmission of international prices, and prevents enhanced market access for imports of certain agricultural products”).

<sup>531</sup> *See Wright, GAIN Report ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40); *see Taylor, “Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry,” Reuters* (Exh. US-8).

<sup>532</sup> For convenience, RIPHs (for horticultural products) and Recommendations (for animals and animal) will be referred to as “MOA Recommendations” in this section.

<sup>533</sup> *See EC – Bananas III (AB)*, para. 197 (“As a matter of fact, none of the provisions of the *Licensing Agreement* concerns import licensing rules, *per se*. As is made clear by the title of the *Licensing Agreement*, it concerns import licensing procedures. The preamble of the *Licensing Agreement* indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the *Licensing Agreement* defines its scope as the *administrative procedures* used for the operation of import licensing regimes.”).

383. Further, although import licensing may be used to implement WTO-consistent import restrictions without necessarily imposing a restriction contrary to Article XI:1, licensing requirements that in and of themselves impose a limitation on or limiting condition on importation or have a limiting effect on trade fall within the scope of Article XI:1 of the GATT 1994.<sup>534</sup> And in this dispute, there is no WTO-consistent measure being implemented through Indonesia’s limited application windows and validity periods. Thus, there is no cause to examine whether the restriction caused by the application window and validity period rules are “additional” to the restriction caused by the measure they implement, as no such underlying measure exists.<sup>535</sup> As the United States has demonstrated, these requirements are restrictions in breach of Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

384. However, to the extent that the Panel finds that the limited application windows and validity periods for MOA Recommendations and Import Approvals both for horticultural products and for animals and animal products are subject to the disciplines of the Import Licensing Agreement, these requirements would be inconsistent with Article 3.2 of that agreement.

### **1. The Limited Application Windows and Validity Periods Are Non-Automatic Licensing Procedures**

385. The application for and receipt of MOA Recommendations and Import Approvals falls within the definition of “import licensing” set out in Article 1.1 of the Import Licensing Agreement as a procedure requiring “the submission of an application . . . as a prior condition for importation” of horticultural products and animals and animal products into Indonesia.<sup>536</sup> As described above, Indonesia sets out limited application windows during which importers may apply for these import permits and establishes limited validity periods during which imports may enter under the permits.

386. Indonesia’s application windows and validity periods are “non-automatic import licensing procedures,” within the meaning of Article 3.1 of the Import Licensing Agreement. Article 3.1 defines non-automatic import licensing procedures in the negative, as “import licensing not falling within the definition contained in paragraph 1 of Article 2.” Article 2.1 defines “automatic import licensing” as “import licensing where approval of the application is

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<sup>534</sup> See *China – Raw Materials (Panel)*, para. 7.957 (finding that “licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1”) (findings mooted on appeal on other grounds).

<sup>535</sup> Cf. Import Licensing Agreement, Article 3.2; *Argentina – Import Measures (AB)*, para. 5.221. There, the Appellate Body recently remarked that, in the context of a provision setting out “exclusions or exceptions” to Article XI:1 “with reference to the concept of ‘necessity’”, “[w]hen a measure imposes a restriction or prohibition on the importation of goods, and such restriction or prohibition *exceeds* what is ‘necessary’ for the authorized objective . . . then such restriction or prohibition will violate the obligation contained in Article XI:1.” *Id.* (italics added).

<sup>536</sup> Article 1.1 of the *Agreement on Import Licensing* defines “import licensing” as “administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.”

granted in all cases, and which is in accordance with the requirements of paragraph 2(a).” Paragraph 2(a), in turn, provides that automatic licensing procedures “shall not be administered in such a manner as to have restricting effects on imports,” and that procedures shall be deemed to have such trade-restricting effects “unless, *inter alia*: . . . (ii) applications for licenses may be submitted on any working day prior to the customs clearance of the goods.”

387. The application windows and validity periods of Indonesia’s import licensing regimes for horticultural products and animals and animal products fail to qualify as “automatic import licensing” and, thus, are classified as “non-automatic import licensing.” First, applications for MOA Recommendations and Import Approvals cannot be submitted on any working day prior to the customs clearance of the goods. To the contrary, as described above, applications may be submitted only during limited application windows during the month prior to the start of an import validity period, i.e., in December of June for horticultural products and in December, March, June, or September, for animals and animal products.<sup>537</sup> Second, as described above (and discussed further below), the application windows and validity periods have a “restricting” effects on imports.<sup>538</sup>

## **2. The Limited Application Windows and Validity Periods Are Inconsistent with Article 3.2 of the *Agreement on Import Licensing***

388. As discussed in the previous section, the application windows and validity periods are non-automatic import licensing requirements. As such, they are subject to Article 3.2 of the Import Licensing Agreement, which states:

Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of the restriction. Non-automatic licensing procedures shall correspond in scope and duration to the measure that they are used to implement, and shall be no more administratively burdensome than absolutely necessary to administer the measure.

389. An evaluation of an import licensing procedure under the first sentence of Article 3.2 requires identification of the “restriction” being implemented by the import licensing procedures. In this instance, however, the legal instruments establishing the application windows and validity periods contain *no* description of or reference to a “restriction” separate from the licensing procedures themselves. To the contrary, MOT 46/2013 suggests only that the purpose of the import licensing regime for animals and animal products is “to improve consumer protection, preserve natural resources, provide business certainty, transparency, and simplify the licensing

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<sup>537</sup> See *supra* secs. III.A.3.b (describing the application windows for horticultural products), III.B.3.c (describing the application windows for animals and animal products); MOA 86/2013, article 13(2) (JE-15) (on the RIPH application window for horticultural products); MOT 16/2013, as amended by MOT 47/2013, article 13A (JE-10) (on the Import Approval application window for horticultural products); MOA 139/2014, article 29 (JE-28) (on the Recommendation application window for animals and animal products); MOT 46/2013, article 12(1) (JE-21) (on the Import Approval application window for horticultural products).

<sup>538</sup> See *supra* sec. IV.B.1.a and IV.D.2.a.

process and the administration of imports.”<sup>539</sup> Similarly, MOT 16/2013, as amended, concerning the licensing regime for horticultural products, states that its purpose is “to protect consumers, promote business certainty and transparency, and simplify the licensing process and the administration of imports.”<sup>540</sup>

390. Further, when Indonesia notified MOT 46/2013 and MOT 16/2013 to the Committee on Import Licensing, the notices did not identify any measure being implemented through the import licensing procedure.<sup>541</sup> Indonesia’s notification for MOT 16/2013 gave no administrative purpose for the regulation,<sup>542</sup> and the notification for MOT 46/2013 stated that the administrative purpose was “to establish healthy trade, conducive business environment and orderly import and administration.”<sup>543</sup> Because the application window and validity period requirements do not implement any underlying “restriction,” Article 3.2 does not reach those requirements. To the extent the Panel were to consider the requirements non-automatic import licensing procedures, however, the restrictive effects of these requirements must be considered “additional” “trade-restrictive or -distortive effects,” under the first sentence of Article 3.2.

391. And, as discussed above, these restrictive effects are considerable. Specifically, the application window and validity period requirements mean that: (1) importers cannot apply for additional or different import permits outside the limited application windows; (2) imports are restricted at the beginning of each validity period because exporters cannot begin conducting the necessary health inspections and shipping the product until after Import Approvals are issued for each period; and (3) imports are restricted at the end of each validity period as importers must stop shipping several weeks prior to the end of the period to ensure that their goods arrive in Indonesia and clear customs before the period’s last day.<sup>544</sup>

392. The analysis under the second sentence of Article 3.2 also must begin with identification of the “measure” that the licensing regime is implementing. For the reasons discussed above, however, the application window and validity period requirements do not implement any identifiable measure.

393. Again, because the application window and validity period requirements do not implement any underlying “measure,” Article 3.2 does not reach those requirements. To the extent the Panel were to consider the requirements non-automatic import licensing procedures,

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<sup>539</sup> MOT 46/2013, preamble (JE-46).

<sup>540</sup> MOT 16/2013, as amended, preamble (JE-10).

<sup>541</sup> See Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/14, June 26, 2013 (Exh. US-54) (notifying MOT 16/2013); Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/19, Feb. 4, 2014 (Exh. US-55) (notifying MOT 46/2013).

<sup>542</sup> Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/14, June 26, 2013 (Exh. US-54).

<sup>543</sup> Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/19, Feb. 4, 2014 (Exh. US-55).

<sup>544</sup> See *supra* secs. IV.B.1.a and IV.D.2.a.

however, the application windows and validity periods must be considered “more administratively burdensome than absolutely necessary to administer the measure.”

394. Therefore, to the extent the Panel were to consider the requirements non-automatic import licensing procedures, limited application windows and validity periods for MOA Recommendations and Import Approvals for both horticultural products and animals and animal products would be inconsistent with Article 3.2 of the Import Licensing Agreement.

## **V. CONCLUSION**

395. For the foregoing reasons, the United States respectfully requests that the Panel find that the prohibitions and restrictions imposed by Indonesia’s import licensing regimes for horticultural products and animals and animal products, operating individually and as whole regimes, and the provisions of Indonesia’s laws conditioning importation on the insufficiency of domestic demand, are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Pursuant to DSU Article 19.1, “[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

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